MONTANA LEGISLATIVE HISTORY

Chapter 461 1995

Bill H 309 S _____ Original bill & history ___C

H. Committee on Judiciary		S. Committee on Judiciary	
Hearing Date(s) 2/02	___C	Hearing Date(s) 3/21	___C
_____	___C	_____	___C
_____	___C	_____	___C
_____	___C	out 3/24	___C
Date Out 2/11	___C		

Did this bill originate in an interim committee? ___Yes X No

Committee _____ Report _____

HB 308 INTRODUCED BY EWER, ET AL.

REVISE LAWS RELATING TO COUNTY WATER AND SEWER DISTRICTS

1/21	INTRODUCED		
1/21	FIRST READING		
1/21	REFERRED TO LOCAL GOVERNMENT		
1/23	FISCAL NOTE REQUESTED		
1/27	FISCAL NOTE RECEIVED		
1/27	FISCAL NOTE PRINTED		
2/02	HEARING		
2/17	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/20	2ND READING PASSED AS AMENDED	91	8
2/22	3RD READING PASSED	86	11
	TRANSMITTED TO SENATE		
2/27	FIRST READING		
2/27	REFERRED TO LOCAL GOVERNMENT		
3/09	HEARING		
3/25	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/29	2ND READING CONCURRED	49	0
3/30	3RD READING CONCURRED	50	0
	RETURNED TO HOUSE WITH AMENDMENTS		
4/04	MOTION FAILED TO CONCUR WITH AMENDMENTS ON 2ND READING	44	56
4/04	CONFERENCE COMMITTEE APPOINTED		
4/07	HEARING		
4/07	CONFERENCE COMMITTEE DISSOLVED		
4/07	FREE CONFERENCE COMMITTEE APPOINTED		
4/10	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/11	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	90	9
4/12	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	90	9
	SENATE		
4/05	CONFERENCE COMMITTEE APPOINTED		
4/07	CONFERENCE COMMITTEE DISSOLVED		
4/07	FREE CONFERENCE COMMITTEE APPOINTED		
4/11	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/11	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	50	0
4/12	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	46	3
4/18	SIGNED BY SPEAKER		
4/18	SIGNED BY PRESIDENT		
4/18	TRANSMITTED TO GOVERNOR		
4/25	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 518		
	EFFECTIVE DATE: 04/25/95		

HB 309 INTRODUCED BY GRIMES, ET AL.

LIMIT NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES

BY REQUEST OF THE GOVERNOR'S OFFICE

1/21	INTRODUCED		
1/21	FIRST READING		
1/21	REFERRED TO JUDICIARY		
2/02	HEARING		
2/11	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/15	2ND READING PASSED	69	31
2/16	3RD READING PASSED	72	25

	TRANSMITTED TO SENATE		
2/21	FIRST READING		
2/21	REFERRED TO JUDICIARY		
3/21	HEARING		
3/24	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/29	2ND READING CONCURRED	33	17
3/30	3RD READING CONCURRED	34	16
	RETURNED TO HOUSE WITH AMENDMENTS		
4/04	2ND READING AMENDMENTS CONCURRED	89	11
4/05	3RD READING AMENDMENTS CONCURRED	82	17
4/10	SIGNED BY SPEAKER		
4/11	SIGNED BY PRESIDENT		
4/11	TRANSMITTED TO GOVERNOR		
4/14	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 461		
	EFFECTIVE DATE: 10/01/95		

HB 310 INTRODUCED BY BARNETT, ET AL.

ALLOW REGULATED COMPANIES TO IMMEDIATELY RECOVER IN THEIR RATES AND CHARGES FEES LEVIED BY THE MONTANA CONSUMER COUNCIL

1/21	INTRODUCED		
1/21	FIRST READING		
1/21	REFERRED TO BUSINESS & LABOR		
1/26	HEARING		
1/27	COMMITTEE REPORT—BILL PASSED		
1/28	2ND READING PASSED	96	1
1/30	3RD READING PASSED	96	3
	TRANSMITTED TO SENATE		
1/31	FIRST READING		
1/31	REFERRED TO BUSINESS & INDUSTRY		
3/01	HEARING		
3/02	COMMITTEE REPORT—BILL CONCURRED		
3/06	2ND READING CONCURRED	49	0
3/07	3RD READING CONCURRED	49	0
	RETURNED TO HOUSE		
3/08	SIGNED BY SPEAKER		
3/09	SIGNED BY PRESIDENT		
3/09	TRANSMITTED TO GOVERNOR		
3/10	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 117		
	EFFECTIVE DATE: 03/10/95		

HB 311 INTRODUCED BY GRINDE, ET AL.

PROVIDE FOR REVIEW AND ASSESSMENT OF PROPOSED EXECUTIVE BRANCH ACTIONS AFFECTING PRIVATE PROPERTY

1/21	INTRODUCED		
1/21	FIRST READING		
1/21	REFERRED TO JUDICIARY		
1/23	FISCAL NOTE REQUESTED		
1/28	FISCAL NOTE RECEIVED		
1/30	FISCAL NOTE PRINTED		
1/31	HEARING		
2/13	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/14	REVISED FISCAL NOTE REQUESTED		
2/15	2ND READING PASSED	99	1
2/15	REVISED FISCAL NOTE PRINTED		
2/16	3RD READING PASSED	98	0

HOUSE BILL NO. 309

INTRODUCED BY

BY REQUEST OF THE GOVERNOR'S OFFICE

A BILL FOR AN ACT ENTITLED: "AN ACT RELATING TO MEDICAL MALPRACTICE CLAIMS AND RECOVERIES; LIMITING NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES; REVISING THE LAW RELATING TO PERIODIC PAYMENT OF FUTURE DAMAGES IN MEDICAL MALPRACTICE CASES; AMENDING SECTION 25-9-403, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Medical malpractice noneconomic damages limitation.** (1) (a) In a malpractice claim or claims against one or more health care providers based on a single incident of malpractice, the combined awards for past and future damages for noneconomic loss may not exceed $250,000, whether:

(i) for one or more claimants in the same proceeding or separate proceedings;

(ii) based on the same act or a series of acts that allegedly caused the injury, injuries, death, or deaths on which the action or actions are based; and

(iii) the act or series of acts were by one or more health care providers.

(b) A claimant has the burden of proving separate injuries, each arising from a different act or series of acts. An award or combination of awards in excess of $250,000 must be reduced to $250,000, after which the court shall make other reductions that are required by law. If a combination of awards for past and future noneconomic loss is reduced in the same action, future noneconomic loss must be reduced first and, if necessary to reach the $250,000 limit, past noneconomic loss must then be reduced. If a combination of awards is reduced to $250,000, a claimant's share of the $250,000 must be the same percentage as the claimant's share of the combined awards before reduction.

(c) For each claimant, further reductions must be made in the following order:

(i) first, reductions under 27-1-702;

(ii) second, reductions under 27-1-703; and

(iii) third, setoffs and credits to which a defendant is entitled.

(2) An award of future damages for noneconomic loss may not be discounted to present value.

(3) The $250,000 limit provided for in subsection (1) may not be disclosed to a jury.

(4) As used in this section, the following definitions apply:

(a) "Claimant" includes but is not limited to:

(i) a person suffering bodily injury;

(ii) a person making a claim as a result of bodily injury to or the death of another;

(iii) a person making a claim on behalf of someone who suffered bodily injury or death;

(iv) the representative of the estate of a person who suffered bodily injury or death; or

(v) a person bringing a wrongful death action.

(b) "Health care provider" means a physician, dentist, or health care facility, as defined in 27-6-103, or a nurse licensed under Title 37, chapter 8.

(c) "Malpractice claim" has the meaning as defined in 27-6-103.

(d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to:

(i) physical and mental pain or suffering;

(ii) emotional distress;

(iii) inconvenience;

(iv) physical impairment or disfigurement;

(v) loss of society, companionship, and consortium, other than household services;

(vi) injury to reputation; and

(vii) humiliation.

NEW SECTION. **Section 2. Periodic payment of future damages in medical malpractice cases.** (1) A party to an action for a malpractice claim, as defined in 27-6-103, in which $50,000 or more of future damages is awarded may, prior to the entry of judgment, request the court to enter a judgment ordering future damages to be paid in whole or in part by periodic payments rather than by a lump-sum payment. Upon a request, the court shall enter an order for periodic payment of future damages. The total dollar amount of the ordered periodic payments must equal the total dollar amount of the future damages without a reduction to present value.

(2) A court ordering the payment of future damages by periodic payments shall make specific findings as to the dollar amount of periodic payments needed to compensate the judgment creditor for

future damages.

(3) The judgment order must specify the recipient or recipients of periodic payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments must be made.

(4) The court shall order that periodic payment of future damages be made, during the life of the judgment creditor or during the continuance of the compensable injury or disability of the judgment creditor, through the purchase of an inflation-indexed annuity approved by the court. The annuity must be in the form of an inflation-indexed annuity contract purchased from a qualified insurer that, in the most recent edition of A.M. Best, has an "A" (excellent) or higher rating and is in a class 7 or higher classification. The annuity also serves as any required supersedeas bond. Upon purchase of a court-approved annuity, the court shall order that the judgment is satisfied and that the judgment debtor is discharged. If the judgment creditor dies before all periodic payments have been made, the remaining payments become the property of the creditor's estate.

Section 3. Section 25-9-403, MCA, is amended to read:

"25-9-403. Request for periodic payment of future damages -- nonmalpractice claims. (1) ~~A~~ Except as provided in [section 2], a party to an action for personal injury, property damage, or wrongful death in which $100,000 or more of future damages is awarded may, prior to the entry of judgment, request the court to enter a judgment ordering future damages to be paid in whole or in part by periodic payments rather than by a lump-sum payment. Upon ~~such~~ a request, the court may enter an order for periodic payment of future damages if the court finds that ~~such~~ periodic payment is in the best interests of the claimant. The total dollar amount of the ordered periodic payments must equal the total dollar amount of the future damages without a reduction to present value.

(2) A court ordering the payment of future damages by periodic payments shall make specific findings as to the dollar amount of periodic payments needed to compensate the judgment creditor for future damages and as to whether an order for periodic payment of future damages is in the best interests of the claimant.

(3) The judgment order must specify the recipient or recipients of periodic payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments ~~shall~~ must be made.

(4) A court ordering periodic payment of future damages shall order that the payments be made, during the life of the judgment creditor or during the continuance of the compensable injury or disability of the judgment creditor, through the purchase of an inflation-indexed annuity approved by the court. The annuity must be in the form of an inflation-indexed annuity contract purchased from a qualified insurer that, in the most recent edition of A.M. Best, has an "A" (excellent) or higher rating and is in a class 7 or higher classification. The annuity also serves as any required supersedeas bond. Upon purchase of a court-approved annuity, the court may order that the judgment is satisfied and that the judgment debtor is discharged. If the judgment creditor dies before all periodic payments have been made, the remaining payments become the property of ~~his~~ the creditor's estate."

NEW SECTION. **Section 4. Codification instruction.** [Sections 1 and 2] are intended to be codified as an integral part of Title 25, chapter 9, part 4, and the provisions of Title 25, chapter 9, part 4, apply to [sections 1 and 2].

NEW SECTION. **Section 5. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 6. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 7. Applicability.** [This act] applies to causes of action arising on or after October 1, 1995.

-END-

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on February 2, 1995, at 7:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: NONE

Members Absent: NONE

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	HB 253, HB 309
Executive Action:	HB 176 DO PASS AS AMENDED
	HB 244 TABLE
	SB 36 BE CONCURRED IN AS AMENDED

Closing by Sponsor:

In closing **REP. BARNHART** pointed out the statistics for divorce in Montana and the numbers which affected minor children. The intent of the bill is to alleviate some of the problems in those cases.

HEARING ON HB 309

Opening Statement by Sponsor:

REP. DUANE GRIMES, HD 39, presented HB 309 which he characterized as a moderate tort reform bill which would be extremely important. It would set a cap on non-economic damages for medical malpractice of $250,000 and set up periodic payments. Though there are few cases settled at that amount in Montana, because the current financial liability is open ended, the malpractice insurance rates for doctors are exorbitant. Economic awards for damages are not capped under this bill. He believed this would help encourage physicians to set up their practices in Montana.

{Tape: 1; Side: B; Approx. Counter: 38.8}

CHAIRMAN CLARK limited testimony to 35 minutes per side.

Proponents' Testimony:

Laurie Ekanger, Governor's Office, said the Governor's Office recommended HB 309 be approved.

Jerry Loendorf, Montana Medical Association (MMA), American Association of Retired Persons (AARP), explained the bill. He said that non-economic damages are those things which are not tied to a dollar amount such as pain, humiliation, suffering, anguish, or grief. Economic damages include health care expenses, loss of earnings, or loss of domestic services. He said this bill requires that the payments be made over a period of time. The advantages are that an annuity can be purchased while still paying the same amount to the person injured. The savings results in less litigation costs for the insurer and he explained how that works. Periodic payments provide flexibility to the injured as the amounts can be increased for future needs such as college. The claimant would have the most say in setting those payments to meet his needs.

Mona Jamison, Doctors Company, said she would guarantee that with the passage of this bill within a three- to five-year period their rates would decrease. They based this guarantee on experience. She distributed written testimony with supporting charts to demonstrate their support of HB 309. **EXHIBIT 4**

{Tape: 2; Side: A}

John Gregory, MD, Billings Surgeon, MMA, said he had long supported tort reform in this area. He believed this to be the year to effect the changes needed. He believed patients should receive legal remedies for injuries and strongly supported the need for Montana's citizens to be made whole economically when they have been injured while under medical care. In the past when liability insurance premiums have increased, these costs were passed on through, but at present they can no longer do that because of serious constraints by payers such as Medicaid and private insurers.

Nancy Clark, Ryegate, Montana, Wheatland Memorial Hospital, presented her written testimony in support of HB 309. **EXHIBIT 5**

Pat Melby, Montana Podiatric Medical Association and Montana Optometric Association, submitted his testimony in support of HB 309 and asked that those specialties be included within the purview of the protections offered by it. Suggested amendments are included in **EXHIBIT 6.**

Mark Staple, Montana Chiropractors Association, said they would support the second amendment proposed by the previous testimony.

Steve Browning, Montana Hospital Association, spoke in favor of the bill. He briefly addressed some causes of increases in health care costs and what he expected opponents to say about capping non-economic damages. He said it is the accumulation of small increases in health care factors which cause the substantial increase in health care costs and it is these factors which must be monitored to guard against rising costs. He amplified the testimony presented by **Nancy Clark** and said that many rural hospitals are experiencing this same dynamic.

Jim Tutwiler, Montana Liability Coalition, supported HB 309 as interested parties in tort reform in liability matters. They believed this bill would bring balance and predictability.

Steve Turkiewicz, Montana Auto Dealers Association, urged support for HB 309.

Laurie Koutnik, Executive Director, Christian Coalition of Montana, submitted written testimony in favor of HB 309. **EXHIBIT 7**

Mary McCue, Montana Dental Association, supported this legislation.

Jim Smith, Montana Pharmaceutical Association, rose in support of HB 309.

REP. ROGER DEBRUYCKER, HD 89, representing three small hospitals in his area, supported HB 390. He presented written testimony from the hospital in Big Sandy. **EXHIBIT 8**

Steve Shipero, Montana Nurses Association, said they support the bill.

Tanya Ask, Blue Cross and Blue Shield of Montana, supported the bill.

Jacqueline Lenmark, American Insurance Association, supported HB 309.

Tom Ebzeny, St. Vincent's Hospital and Montana Associated Physicians, supported the bill.

Rose Hughes, Montana Health Care Association, supported the bill.

{Tape: 2; Side: A; Approx. Counter: 20.8}

Informational Testimony:

Supporting testimony is included as **EXHIBITS 9 and 10.**

Additional written testimony was submitted February 9, 1995 in support of HB 309. **EXHIBIT 11**

Opponents' Testimony:

Randy Bishop, Montana Trial Lawyers Association (MTLA), felt from his experience that he knew both sides and the reality of how the jury system works. He said that HB 309 says yes to government interference and that it does not trust the registered voters to make intelligent decisions about their lives, property and the future of their fellow citizens. He said the committee needed to ask what the problem is and what the proposed solution is. Then he said they needed to ask who would benefit from the proposed solution and who would get hurt. He said they were being asked to impose a solution on a problem without being told what the problem is. He said the problem was carelessness. He presented **EXHIBIT 12** in support of his argument.

D. P. Carestia came as a person who had been involved in placement of periodic payment or structured sum annuities over the course of at least ten years. He presented his credentials as an opponent of HB 309. Although annuities can be a very good tool, he did not believe they should be mandated or universally applied in every case. Annuities are inflexible contrary to previous testimony and he explained why that is true from his experience. The second factor he wanted the committee to consider was the risk associated with the life insurance industry. He said that the company which rates the insurance companies has changed its criteria and therefore, there is a change in the categories where investments are being made. Therefore the financial stability upon which the industry relies is troubled.
He gave extensive testimony to back up his claims.

Mark O'Keefe, State Auditor, Commissioner of Insurance and Securities, stood in opposition to the bill mainly because they take 27,000 calls a year from insured people with compelling stories about the harm they have endured. He told of the recommendation and observation of **SEN. GAGE** and that is submitted as **EXHIBIT 13.** He refuted previous testimony that this type of legislation was responsible for decreases in rates by saying that competition in the Colorado industry helped drive down the rates. He felt that free-market competition was a better solution than regulating benefits in tort reform. The "med-mal" (sic) industry has six times the profit of any other insurance industry that does business in the state. He further stated that the Doctors' Company had asked for a premium rate increase of 17.7% in 1994 though they claimed they could actually charge an increase of over 62% if they wanted to. The state auditor asked for proof to back up the claim. They received 170 days later a withdrawal of the 17.7% increase and a request for only a 6.6% increase. He said the committee must make the Doctors' Company prove their claims and give the auditor's office the authority to collect the data and bring it back to the legislature to see if the tort reform has resulted in their claims.

{Tape: 2; Side: B}

Russell Hill, MTLA, presented written testimony in opposition to HB 309 as well as a complete copy of **SEN. GAGE'S** committee report which represented a two-year exhaustive study.

Edmund Caplis, Executive Director, Montana Senior Citizens' Association, opposed the bill.

John Morrison, Attorney in Helena, opposed the bill.

Tom Keegan, Attorney, opposed the bill.

Questions From Committee Members and Responses:

REP. SHEA asked **Mr. Morrison** to present more of his testimony.

Mr. Morrison cited a case which involved a woman dying of breast cancer and how the husband and children would be compensated for their loss under the provisions of this bill.

REP. BILL TASH asked how many malpractice insurance companies had responded to the State Auditor's recruitment letters to enter Montana.

David Gallik, Insurance Commissioner's Office, said he did not know the exact figures but there had been more interest than there was in the past. He said there are about nine who are expressing interest or who have begun to do business in Montana.

REP. TASH asked if he understood that there are basically only two companies in the state.

Mr. Gallik said there are three, the Doctors' Company, Utah Medical and St. Paul Fire and Marine, who are active.

REP. ANDERSON wanted to discuss the *Billings Gazette* editorial on punitive damages and asked if they were talking about something other than punitives here.

Mr. Bishop agreed that they were. It has been made clear to the press that punitive damages against doctors are not the problem. He said MTLA offered $1,000 for each case that could be filed in the last 25 years where an award of punitive damages was made against a doctor. That $1,000 was offered to charity and the offer was printed as an ad in a Great Falls paper. There was only one case which surfaced as a result of the ad. The Billings paper studied the information and concluded that punitive damages are not an issue. He pointed out the rest of the editorial which was included in the materials he distributed during testimony. **EXHIBIT 12**

REP. ANDERSON stated that nothing this bill does affects punitive damages and asked for confirmation.

Mr. Bishop said that was true.

REP. ANDERSON again referred to **EXHIBIT 12** which showed that 40% of the claims are against 4% of the providers. He asked if they are a particular type of provider.

Mr. Bishop was not sure the data which is available would give that information. The information upon which the decisions should be made is very limited.

REP. ANDERSON asked rhetorically if **Mr. Bishop** would support a fully informed jury since he suggested in testimony that juries should be given more credit in settling these malpractice cases.

Mr. Bishop said he would not and then explained why. Within the context of the law, they are saying that juries should be free to exercise their community judgment in malpractice cases.

REP. TASH asked how many awards are denied when it is mal_____(inaudible) rather than malpractice.

Mr. Bishop said only 19 cases have gone to trial against doctors in the last ten years and of those cases 15 were won by the doctor. The jury made a determination that the doctor did not do wrong. The majority of those cases settle and the average settlement is less than $100,000.

{Tape: 2; Side: B; Approx. Counter: 14.2}

REP. LINDA MC CULLOCH asked **Mr. Hill** to give a brief rundown of the content of **SEN GAGE'S** study.

Mr. Hill asked the committee to read the first two paragraphs of his written testimony for two of the conclusions of the study. Professional liability insurance for health care providers is available at competitive rates and very few claims result in lawsuits and that those that do are settled more often than not in favor of the defendant. The evidence presented did not support the contention that there was a medical malpractice crisis in Montana that warranted the passage of specific tort reform measures. No evidence was presented that supported the contention that the passage of tort reform measures would result in health care cost savings either to health care providers or consumers.

REP. MC CULLOCH asked **Mr. Bishop** if juries are not told there is a cap on the awards and if so to please explain it.

Mr. Bishop said that under the bill, there is an express provision which says the jury is not to be informed that there is a $250,000 cap. He did not know exactly what the reasoning was but suspected that it is an effort to keep that information from the jury so that they won't know that the hand of government is in there controlling their decision.

REP. MC CULLOCH asked if there are multiple claims against a series of doctors by a single patient, would they be limited to the $250,000 or would it be $250,000 against each doctor in the case.

Ms. Jamison said there is only one $250,000 cap.

REP. MC CULLOCH asked if they could guarantee that these reduced rates would be eventually passed down to the patients.

Ms. Jamison answered, "No." She said that is not what tort reform is about.

REP. MC CULLOCH asked what the average non-economic claim is in Montana.

Ms. Jamison said she did not have that information and referred the question.

Mr. Loendorf said he did not have the figure, but didn't think the average figure was important where the large awards are important which would affect premiums.

REP. MC CULLOCH referred to **Dr. Gregory's** testimony where he said a doctor's pay would go down as a result of reduced premiums being passed on to the patient. She asked if the reason for the reduced payment to the doctor would be because he wouldn't have that premium to pay.

Dr. Gregory answered that he was speaking to the fact that in the past premium increases could be passed on to the patient. At

present they cannot do that because reimbursement rates are static and falling slightly. In the future, reimbursement will go down significantly because entitlements probably will have to include Medicare as a significant portion of lower reimbursement. There would be no place to pass on premium increases. They want premiums to stabilize.

REP. MC CULLOCH suggested that if the pay goes down by $100 because the premium has gone down by $100 and they wouldn't be charging the patient that $100, he wouldn't be losing money because of this.

Dr. Gregory said that if this bill passed, the premiums should go down.

{Tape: 2; Side: B; Approx. Counter: 27.3}

REP. WYATT asked for a definition of non-economic damages and she set up a scenario which included a child born with physical defects to gain understanding.

Mr. Bishop said the outlined scenario was complicated with pre-existing problems. They would have to segregate out any economic expense that would be directly related to the surgical attempt to correct the defects which may have failed due to malpractice and thus shortened the life of the child. HB 309 would result in taking the possibility away from that child to live the life it was given to the full by telling the jury what they can compensate.

REP. SOFT asked for a response from **Ms. Jamison** to the testimony of **Mr. Bishop** which related to over collection by the Doctor's Company.

Ms. Jamison rebutted the testimony with statistics of their collection of premiums in relation to claims paid.

REP. SOFT asked for her response to the State Auditor's testimony about the rate increases.

Ms. Jamison said that when that was first submitted at 17% and was later dropped to 6.6% because of competition. She wanted the committee to know that the increase which was finally submitted and approved was not adequate to cover all of the outstanding claims in the way the actuaries figure it out. She said there is a benefit to competition, but tort reform would encourage more companies to come because they would know they could reduce the volatility in non-economic damages. The information was given in good faith and was adjusted to reflect the market.

REP. SOFT asked her to address the discussion on the credibility of the best rating system and about variable annuities not being covered by the Montana Guarantee Association.

Ms. Jamison rebutted the testimony and offered options for the committee to consider. She said amendments in that area might be appropriate which would reduce the fears associated with the ratings. She could not recall if the opponent's testimony was the case regarding the variable annuities.

REP. SOFT asked for her response to **SEN GAGE'S** report that summarized says, "If it ain't broke, don't fix it."

Ms. Jamison said the report was replete with statements that say the data was insufficient and inadequate. She said she would provide those pages to the committee. She referred to a letter submitted to the committee from **SEN GAGE** explaining and modifying his personal opinion of what happened during that committee report.

REP. SOFT asked what **Dr. Gregory** had seen happen to his liability premiums in the last ten years.

Dr. Gregory did not know because they were with a new company and he is insured with a group.

REP. SOFT asked who pays his premiums.

Dr. Gregory answered, "The clinic."

REP. SOFT asked the doctor to respond to the testimony that 80,000 Americans are killed due to malpractice per year.

Dr. Gregory thought **Mr. Bishop** was referring to a Harvard study of several New York Hospitals and had presented it selectively. He cleared it up according to his interpretation which included that these statistics involved patients who were critically ill and in essence "doomed" because in those cases there was vastly more room for human error since several complicated steps were involved in their treatment.

REP. SOFT asked how medical malpractice cases are monitored in Montana.

Dr. Gregory did not know who were involved in the data represented in the testimony about repeat offenders. He said the majority are specialists who do very complex work though there are some in the statistics who are general practitioners who do not do good work. As the complexity of case increases the opportunity for "mal-care" (sic) and negligence also increases.

REP. SOFT referred to the amendments offered to include podiatrists, etc., and asked how the sponsor was responding to those amendments.

REP. GRIMES said he would not object to those amendments.

{Tape: 2; Side: B; Approx. Counter: 46.9}

REP. KOTTEL asked **Mr. Hill** if passage of HB 309 would have a direct impact on the increase of doctors in rural areas.

Mr. Hill replied that in his opinion, it would not and might even worsen the situation and he explained. He said there is a problem with liability for rural physicians not because of the numbers of times they are sued but because of the refusal of insurers to charge different premiums for the rural family practitioner who delivers a smaller number of babies than they charge for the urban physician who delivers a larger number for instance. He also felt that rural people are very mobile and prefer to receive their medical treatment in urban medical centers.

REP. KOTTEL asked if there was a decrease in the numbers of physicians practicing in Montana.

Mr. Hill said there had been a dramatic increase in the numbers of physicians in Montana over the last several years.

REP. KOTTEL asked why the reduction in premiums would not decrease health care costs to the consumers.

Mr. Hill thought there was no evidence in Montana or elsewhere that those savings would ever get passed on to consumers. It might be appropriate for the MMA and insurance carriers to desire the passage of HB 309 because it would lower premiums.

REP. KOTTEL repeated testimony of **Ms. Jamison** about the $250,000 cap as being enough payment for something which cannot be itemized and asked **Mr. Hill** to respond.

Mr. Hill thought the proponents were saying that if it can't be documented, if it is not economic damages, it's not real. He said that the proponents want the committee to believe there is a vertical line drawn with economic damages on one side and non-economic damages on the other. He said that is incorrect and explained his opinion. He said this bill would create a situation where the injured party would recover damages limited by the cap while the doctor suing a manufacturer and citing his loss of reputation as cause would recover a much greater amount. He felt this was grossly unfair.

REP. KOTTEL cited a case in Great Falls to continue the rebuttal of the proponent's position.

Mr. Hill responded that the whole debate was turning on the difference between economic and non-economic damages and he challenged the committee to ask why that distinction is important in terms of the argument about the volatility of the market and the need to stabilize rates to decrease costs. The carriers don't write separate coverage for economic or non-economic damages. An insurance policy already has limits which act as a cap.

REP. KOTTEL asked if it was a valid parallel between automobile insurance rates depending on the quality of the driver's record and medical insurance.

Mr. Hill said it is not. Medical insurance companies refuse to experience-rate their doctors. "Bad doctors don't pay more than good doctors."

{Tape: 3; Side: A}

REP. KOTTEL referred to **EXHIBIT 12** to shore up the reply by **Mr. Hill** who expanded on his testimony by asking the committee to ask the proponents to be specific about how much the rates would go down and why doctors who are being repeatedly sued are not known by the general public.

REP. WYATT asked for clarification of **Dr. Gregory's** testimony about the seriously ill patients who were included in the Harvard study. She was concerned that he implied that their standard of care was different from the usual patient.

Dr. Gregory said he was trying to point out that the majority of patients in the Harvard study were critically ill and elderly and as such required much more complex care and as the complexity of care increases, the opportunity for errors increases. That was why most cases of negligence were found in this patient population. To assume that these errors are all preventable is not realistic in his view.

REP. WYATT asked how the data could be incorporated into this bill so that the auditor's office will have the statistical information to track this to determine the impact.

Margaret Miksch, Actuary, Insurance Department, State Auditor's Office, said it would be helpful to have the loss experience exposures rated by a rating organization such as Insurance Services Office.

{Tape: 3; Side: A; Approx. Counter: 5.4; Comments: The testimony above is barely audible on the tape and therefore may be incomplete.}

CHAIRMAN CLARK asked the administrator of the Harlowton Hospital to respond to the testimony about why rural hospitals do not have obstetric care any longer.

Diane Jones, RN, Administrator, Wheatland Memorial Hospital, said that during the time she worked as a staff nurse at that hospital they had stopped OB care due to the high cost of malpractice insurance. She saw that causing a further loss to the families in that area in follow-up care of the children. They felt that having no limits on malpractice costs is debilitating for the community because they cannot afford it and it has also caused that community to go without a physician for long periods.

REP. SMITH asked if nurse practitioners and midwives would be as liable as physicians in their scope of care primarily in delivery services.

Mr. Hill said his understanding was that those health care providers are not held to a physician standard of care, but held to the standard of care within their own category of licensing.

REP. SMITH asked **Ms. Jamison** the same question.

Ms. Jamison said the standard of care applied to a doctor is different from the standard of care applied to a midwife or a nurse practitioner. The physician is held to a higher standard. She replied to further questioning that the Doctor's Company does not cover midwifery malpractice. She emphasized said that there are sometimes just bad outcomes and it isn't always somebody's fault with someone to pick up the cost of those bad outcomes.

REP. SMITH asked what the impact of caps on premiums would have.

Mr. Hill replied that even if these caps are passed, they will not apply to certain malpractice cases because they are cases governed by federal law that state law can't supersede. The money doesn't come from reducing volatility, but it comes from taking money from somebody who is horribly disfigured or physically impaired.

REP. AHNER commented that sometimes it isn't people who cause the outcome, sometimes it is just life.

REP. ANDERSON referred to line 25 on page 1 where it says, "the claimant's share of the $250,000 must be the same percentage as the claimant's share of the combined awards before deduction." He asked if the jury were to award $1 million and lawyers' fees of one-third were deducted, would the lawyers' fees apply by one-third to the $250,000; or did it mean that if the claimant's award was $660,000 he would receive the entire $250,000.

Mr. Loendorf replied that the attorney's fee isn't in anyway affected by this bill or that particular sentence. Whatever agreement the attorney has with the client determines the percentage deducted from the award.

REP. ANDERSON said he was confused about the claimant's share being the same percentage as the claimant's share of the combined awards before reduction.

Mr. Loendorf explained by example that if there were awards to three people receiving the same award, they would receive an equal share. If they received unequal awards, they would each receive proportionate shares.

{Tape: 3; Side: A; Approx. Counter: 21.5}

Closing by Sponsor:

REP. GRIMES pointed out that though **SEN. GAGE'S** report included remarks that there was insufficient data, the interim subcommittee was representative of the 1993 Legislature with a bias against tort reform. In addition, another subcommittee report of October 1992 did look in detail at these issues and did compare to other states and their conclusion was the opposite of this subcommittee report which was mentioned in testimony. Their response was that medical malpractice tort reform was needed. He continued to point out the deficiencies of the more recent report. He said this is a common sense bill good for Montana by giving citizens who have been wronged a larger share of the damages. This gives trial lawyers less because they will get paid at the current value of the annuity. He gave an example to back up his statement. He said this bill simply caps non-economic pain and suffering damages and would stabilize the insurance market. He further stated that the big government argument is a smoke-screen. The real issue is not negligence, but what is fair. Insurance companies share the risk and that poor doctors will be assessed a surcharge for what they do and if they continue to have a problem, they will be dropped from the insurance.

Motion: REP. ANDERSON MOVED TO ADJOURN.

{Comments: This set of minutes is complete on three 60-minute tapes.}

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 2/2/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

EXHIBIT 4
DATE 2/2/95
HB 309

JAMISON LAW FIRM
ATTORNEYS AT LAW
MONA JAMISON
STAN BRADSHAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: House Judiciary Committee

FROM: Mona Jamison, Lobbyist for "The Doctors' Company"

RE: Testimony on HB 309 -- $250,000 Cap on Noneconomic Damages

DATE: February 2, 1995

Section 1 of HB 309, however, limits awards for *noneconomic* loss. Noneconomic loss is defined in HB 309 as "pain, suffering,inconvenience, loss of consortium, physical impairment, disfigurement, and other non-pecuniary damages." No provision on HB 309 limits payments for *economic damages* such as lost wages and medical costs. These real damages are not affected by this bill.

Skilled attorneys can use the sympathy factor to manipulate juries into awarding high amounts for noneconomic damages. Placing a cap on such damages significantly reduces the cost of all claims, regardless of noneconomic factors. The cap allows malpractice insurance carriers to keep premiums down, which in turn allows physicians to continue delivering services. This is a benefit in rural areas and also for physicians practicing in high risk specialties, such as obstetrics.

The vast majority (over 95%) of medical malpractice cases are settled out of court and the damages typically are not categorized as economic or noneconomic. The lack of a cap on noneconomic damages leads to increases in the amount required to settle cases without a trial even though the actual settlement may not involve damages specifically categorized as an award for "pain and suffering."

A cap on noneconomic damages is singularly the most important element of stabilizing and reducing premiums for medical malpractice insurance for physicians.

-END-

JAMISON LAW FIRM
ATTORNEYS AT LAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

MONA JAMISON
STAN BRADSHAW

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: House Judiciary Committee

FROM: Mona Jamison, Lobbyist for "The Doctors' Company"

RE: Testimony on HB 309 -- Periodic Payments of Future Damages in Excess of $50,000

DATE: February 2, 1995

This provision allows settlements and judgments for "future" damages to be made in payments at regular intervals. Future damages are defined as payment for future medical treatment, care or custody, loss of earnings, or future noneconomic damages such as pain and suffering.

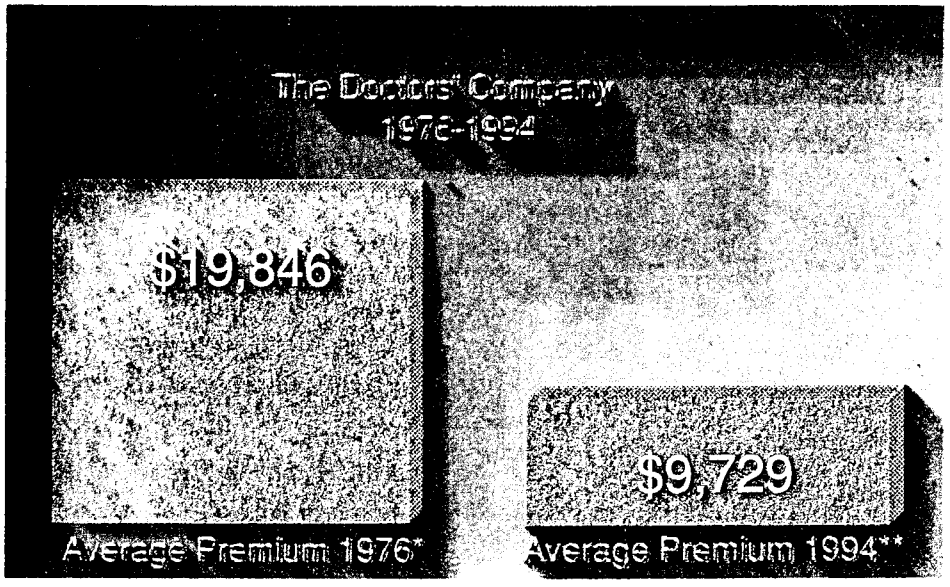
1. The injured patient receives more of an award under the periodic payment scheme proposed in Section 2 of HB 309. The attorney, however, receives less. Under a lump sum scheme, the plaintiff's attorney's fee is much higher because the fee is a percentage of a large amount instead of a percentage of a large amount reduced to its present value. This is also one aspect of the inherent conflict of interest presented by the contingency fee arrangement.

2. Periodic payments contribute to insurance premium stability. When the periodic payment of future damages is mandatory, as proposed in HB 309, it is easier for the insurer to calculate appropriate reserves. When an annuity can be bought within premium limits, reserves are calculable. Large lump sum losses that exceed premium limits wreak havoc with reserves and contribute to premium instability. In less populated states, substantial premium increases can result from even one large verdict or settlement that must be paid in a lump sum.

3. The tax consequences of periodic payments are much more favorable to the plaintiff. A lump sum payment itself is not taxable. However, when that sum is invested, the interested is taxable. Likewise, when payments are periodicized, each payment (which includes imputed interest) is not taxable. Where a portion of the payment is invested, the taxable income is taxed at a lower rate than income from a larger, lump sum.

4. When periodic payments are mandatory, settlement negotiations are more successful. When the plaintiff's attorney knows that future damages will be periodicized, he will be less likely to take the case to trial because it will not increase his chances receiving a higher fee--his fee will be lower than under a lump sum award. Overall, however, the patient receives the same amount of money (including imputed interest).

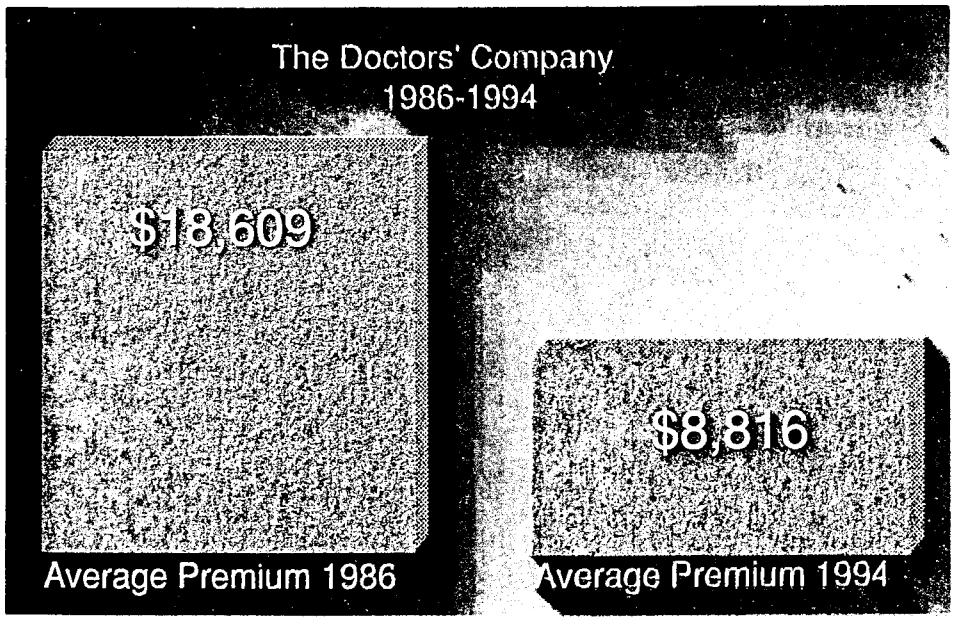
MICRA Reduces California Medical Liability Premium Rates by 51%



*$7,604 average premium adjusted to 1994 dollars on the December Urban CPI Index for a $1 Million / $3 Million Claims-Made Policy Premium

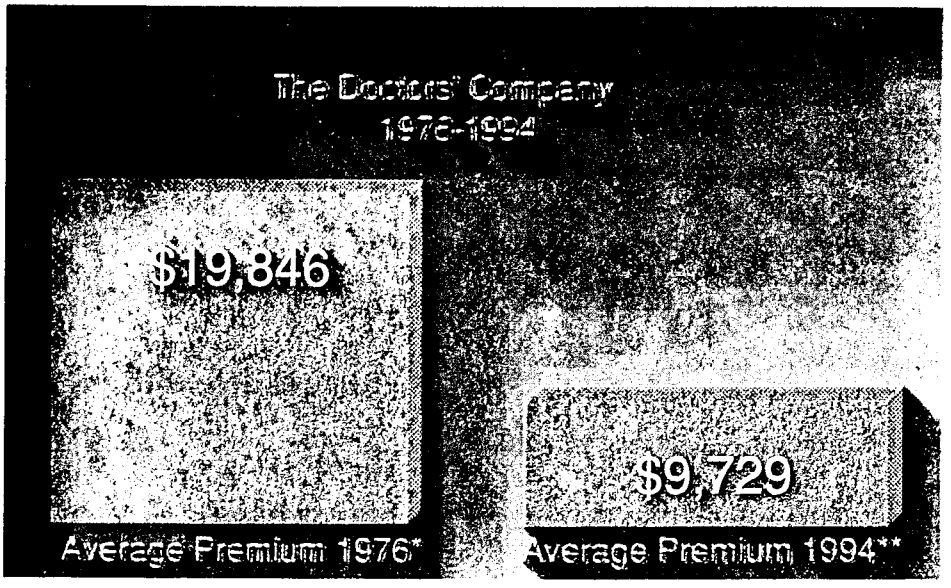
**After dividend deduction (where applicable) for a $1 Million / $3 Million Claims-Made Policy Premium

Tort Reform Reduces Colorado Medical Liability Premium Rates by 53%*



*The Doctors' Company's average of all specialties, including dividends for a $1 Million / $3 Million Claims-Made Policy Premium

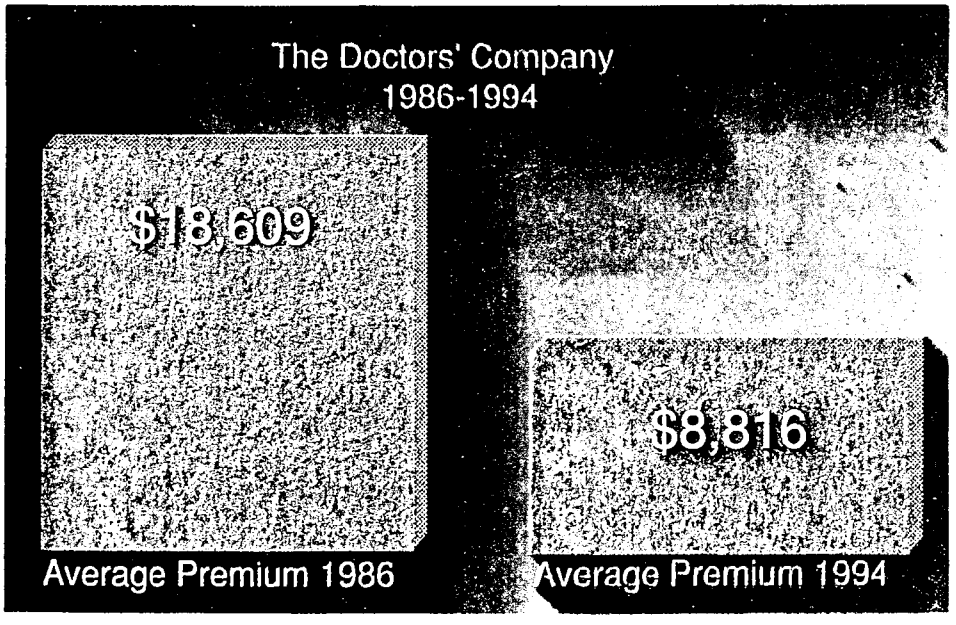
MICRA Reduces California Medical Liability Premium Rates by 51%



*$7,611 average premium adjusted to 1994 dollars on the December Urban CPI Index for a $1 Million / $3 Million Claims-Made Policy Premium

**After dividend deduction (where applicable) for a $1 Million / $3 Million Claims-Made Policy Premium

Tort Reform Reduces Colorado Medical Liability Premium Rates by 53%*



*The Doctors' Company's average of all specialties, including dividends for a $1 Million / $3 Million Claims-Made Policy Premium

EXHIBIT 4
DATE 2-2-95
HB 309

5. Experience shows that when periodic payment provisions are discretionary, such as in existing law, judges, more often than not, will not exercise their discretion and order such payments. Thus, even though the mandatory periodic payment section is second in importance to the cap on non-economic damages on premium stability, only a mandatory provision will be effective.

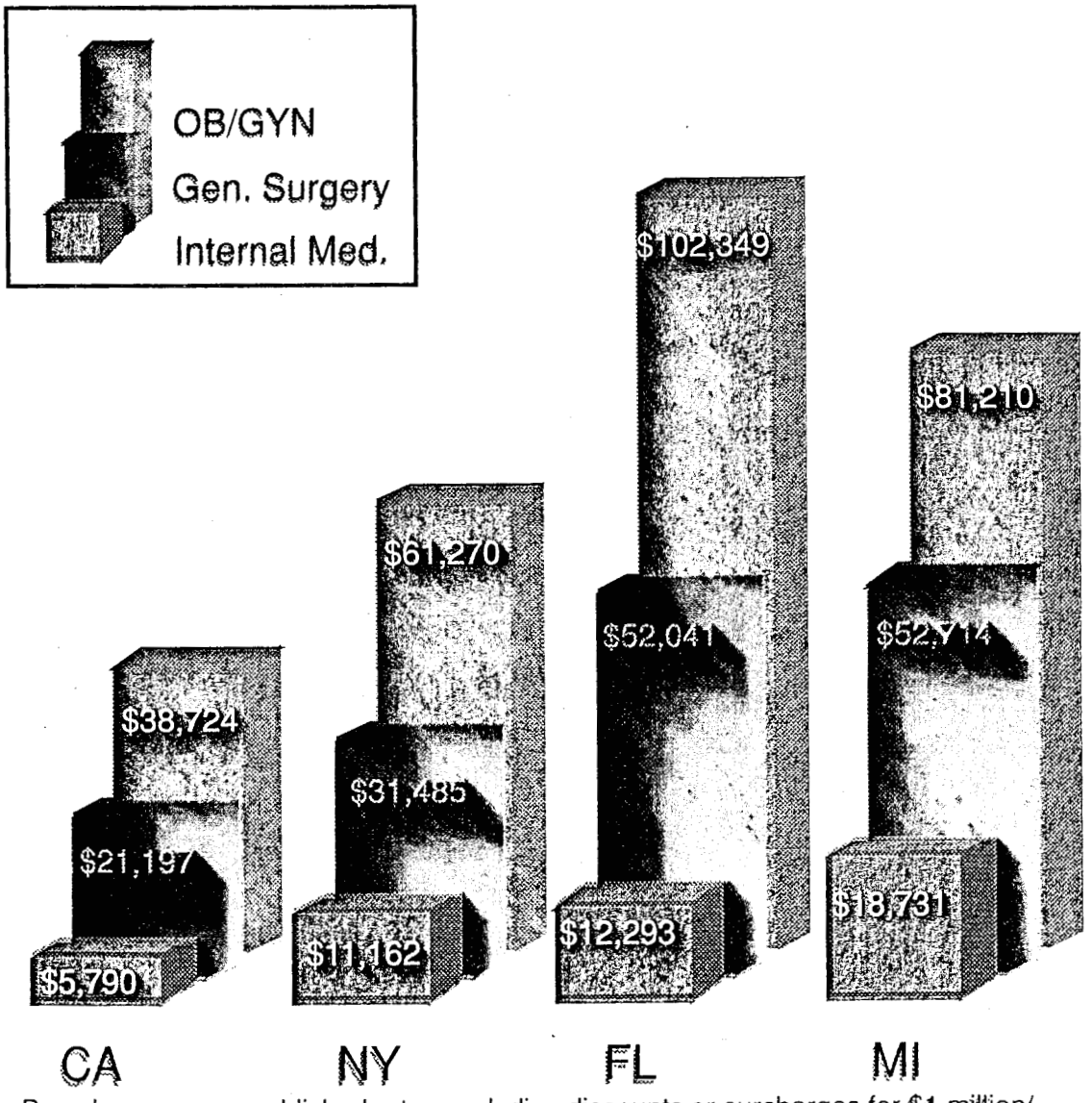
6. Studies have shown that large lump sum payments are often depleted by the patient and/or the patient's conservator, often a family member. Since large lump sum payments are intended for future medical costs and lost wages, bad investments or extravagant expenditures use up the funds, which then become unavailable for their intended purpose.

-END-

EXHIBIT 4
DATE 2-2-95
HB 309

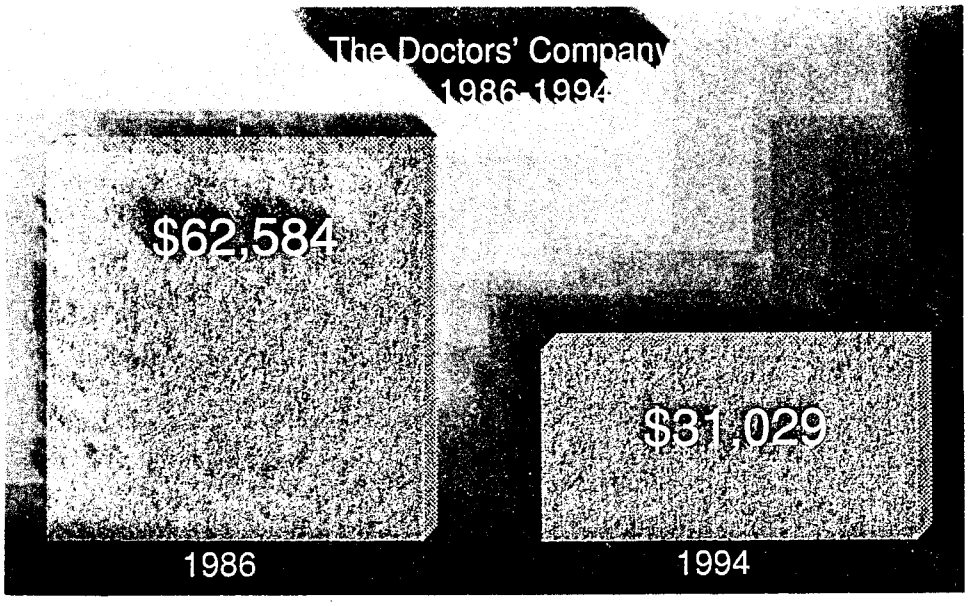
California Premiums Are Now Lower

Thanks to MICRA, liability insurance rates for California physicians are now one-third to one-half those paid by physicians in states that have failed to enact MICRA-like reforms, and that benefits all Californians.



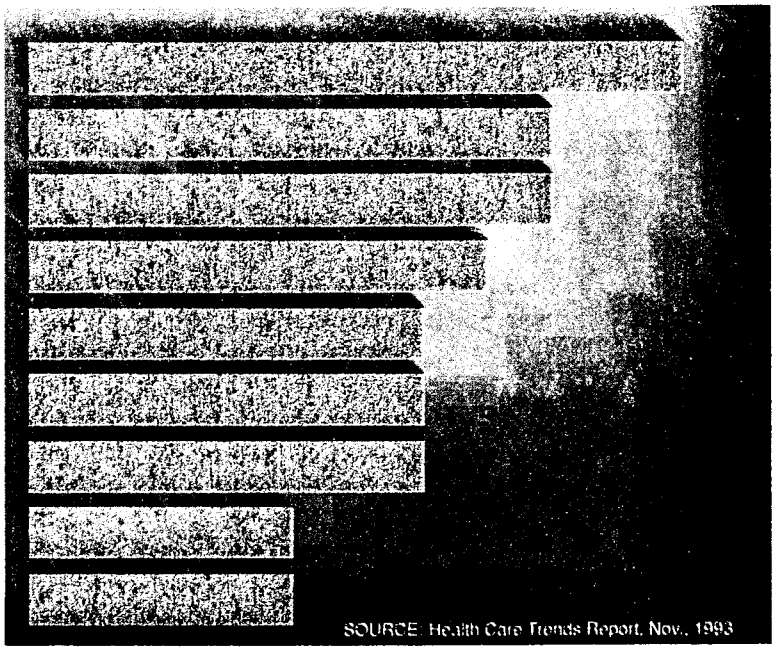
Based on average published rates excluding discounts or surcharges for $1 million/ $3 million in liability coverage.

Tort Reform Reduces Colorado OB/GYN Rates by 51%*



*The Doctors' Company's premiums, including dividends for a $1 Million / $3 Million Claims-Made Policy

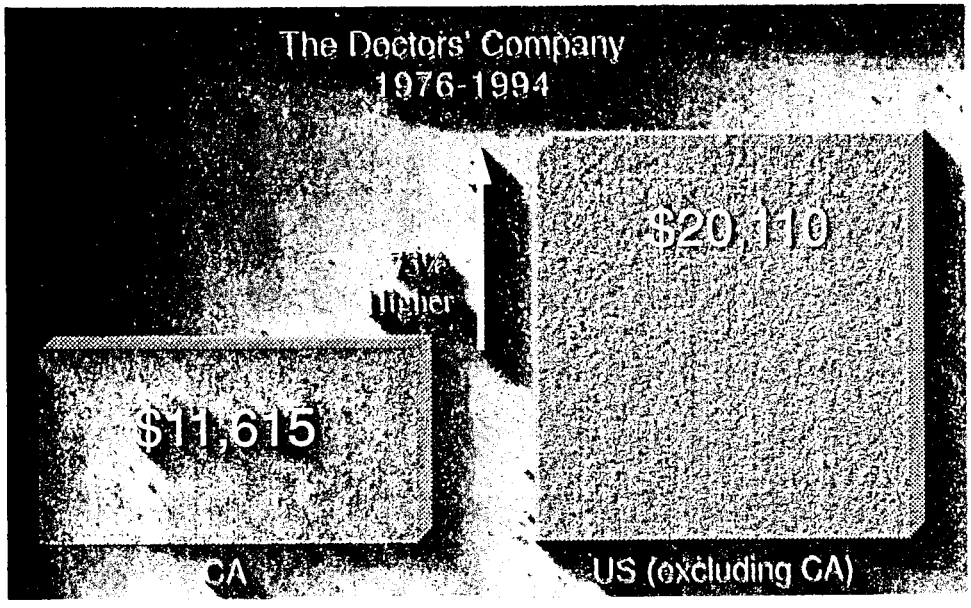
Average Annual Growth In Per Capita Spending 1980-1991*



*Includes per capita spending for hospital care, physician services, and prescription drugs

EXHIBIT 4
DATE 2-2-95
HB 309

Average of All Settlements & Jury Verdicts



MICRA Reduces Verdict Cost & Frequency

$1 Million + Verdicts Per 1,000 Doctors

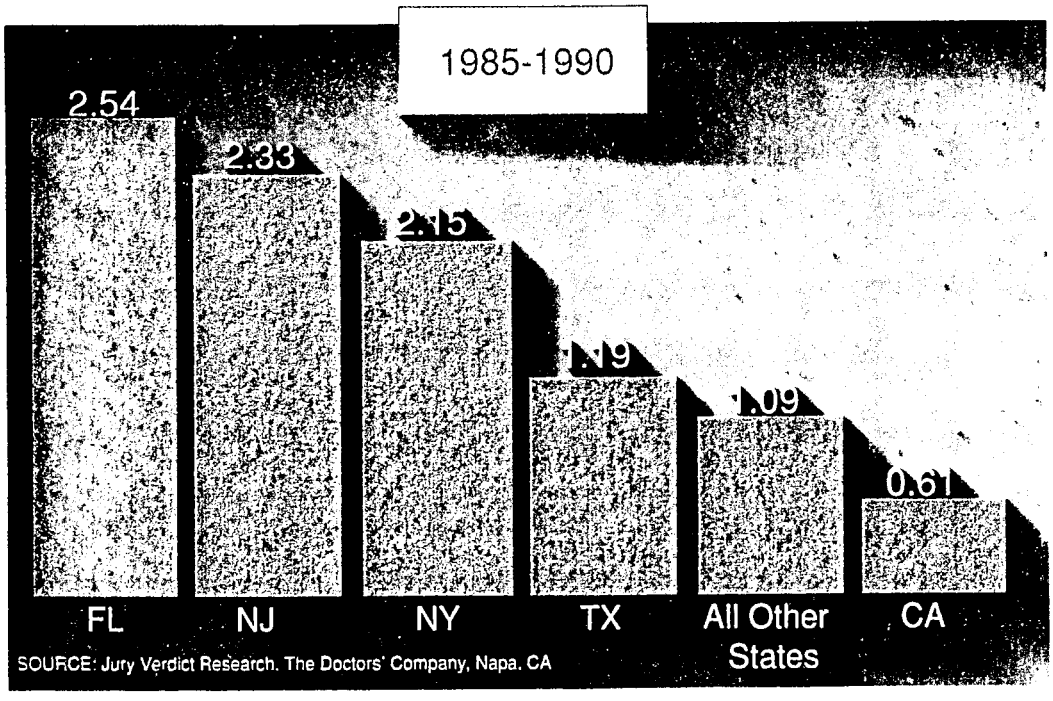


EXHIBIT 5
DATE 2/2/95
HB 309

February 2, 1995

Mr. Chairman and members of the committee.
My name is Nancy Clark, I'm from Ryegate, MT . I'm on the board of Trustees for the Wheatland Memorial Hospital in Harlowton Montana.

I speak in support of this bill.

It has been demonstrated that the states who have adopted similar legislation to this bill have lowered their mal-practice premiums rate

There is a direct correlation between insurance premiums - hospital cost - and services that can be offered.

In ~~1978~~ 1987 the Harlowton Hospital was forced to discontinue offering obstetrical services because of the increase in medical mal-practice insurance premiums for our doctors. We would no longer deliver babies.
This meant the women would have to travel 90 miles to Billings or 60 miles to Lewistown.

An average of 35 babies are born in Wheatland Co. per year. This means since ~~1987~~ 280 babies have been born, granted not all these mothers would have delivered in Harlowton but a good share would have. Calculating the 280 births at the 1987 cost of $1800 dollars the Harlowton Hospital has lost revenue in the

neighborhood of $500,000. (5 Hundred thousand dollars). In a large number of cases the mother continues seeing a pediatrician where ever she deliver and we therefore lose additional revenue.

I think we have an obligation to the people of Montana to do everything we can to keep the cost of hospital care affordable and to offer quality service in each community. The end means of this bill will enable us to do this . I urge you to support this bill. Thank you.

EXHIBIT 6
DATE 2/2/95
HB 309

M E M O R A N D U M

TO: House Judiciary Committee

FROM: Pat Melby PEM

DATE: February 1, 1995

RE: House Bill 309: Testimony on behalf of Montana Podiatric Medical Association & Montana Optometric Association

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I represent the Montana Optometric Association and the Montana Podiatric Medical Association. Both of those professional associations support House Bill 309 but feel that there is no reason why optometrists and podiatrists should not be included in the purview of the protection offered other health care professionals in the bill.

I have reviewed the statutes of the states which have caps on economic damages in malpractice actions to determine whether the statutes of those other states are limited to only a few providers, as is House Bill 309, or cover other health care providers. I reviewed the laws of states identified in a May 23, 1994, study prepared by the Center for Economic Policy Research at Stanford University, as states having caps on damages. According to that study, ten states currently have some type of cap on damages.

Alaska has a cap on noneconomic damages, except for disfigurement or severe physical impairment, which is applicable to all personal injury actions, not just medical malpractice.

Alabama's limit on noneconomic damage awards is applicable only in malpractice actions against doctors, dentists and hospitals.

The laws of the remaining eight states, however, provide that the limits on noneconomic damages are applicable in actions against most health care providers, including podiatrists and optometrists. The definitions of health care provider in those states either 1) contain a simple reference to a practitioner of the healing arts, 2) contain a long laundry list of health care providers, or 3) refer to health care providers licensed by the state. Those states are California, Colorado, Louisiana, Massachusetts, Michigan, Missouri, New Mexico and Utah. (Louisiana's limitation applies to all damages.)

Optometrists and ophthalmologists often work cooperatively on cases. For instance following eye surgery by an ophthalmologist,

a patient may be referred to an optometrist for follow up care. If the patient experiences a problem, such as a detached retina, both the optometrist and the ophthalmologist will be sued. Under House Bill 309 as introduced, there would be a cap on the noneconomic damages that could be recovered from the ophthalmologist, but the amount of non economic damages that could be recovered from the optometrist would remain unlimited.

Likewise, a podiatrist and an orthopaedic surgeon are both licensed to perform surgery on the foot. Yet, in a malpractice action, the orthopaedic surgeon would have the protection of a cap on noneconomic damages under House Bill 309 as introduced, while the podiatrist would not.

We think it makes sense to include all similarly situated health care professionals within the definition of "health care provider" in House Bill 309.

I have attached some suggested amendments, one expanding the definition of health care provider to add only podiatrists and optometrists, and another to expand the definition to include those health care professionals listed in the statute applicable to the statute of limitations for malpractice actions. Either alternative would be acceptable to my clients.

I urge that the committee amend House Bill 309 to include podiatrists and optometrists and then give the bill a do pass recommendation.

EXHIBIT 6
DATE 2-2-95
HB 309

Proposed Amendments to House Bill 309

February 1, 1995

Prepared by Pat Melby
for
The Montana Optometric Association &
The Montana Podiatric Medical Association

First Alternative is to simply expand the definition to add only podiatrists and optometrists as follows:

1. Page 2, line 11.
Following: "27-6-103,"
Insert: "a podiatrist licensed under Title 37, chapter 6, an optometrist licensed under Title 37, chapter 10,"

Second Alternative is to provide a broader definition of health care provider as follows:

1. Page 2, line 10.
Following: "means"
Strike: "remainder of line 10 and line 11 in their entirety
Insert: " a health care professional listed in 27-2-205, or a health care facility licensed under Title 50, chapter 5."

action commenced on or after October 1, 1993, regardless of when the cause of action arose. To this extent, [sections 3 and 4] [27-7-217 and 27-2-204] apply retroactively, within the meaning of 1-2-109."

27-2-205. Actions for medical malpractice. (1) Action in tort or contract for injury or death against a physician or surgeon, dentist, registered nurse, nursing home or hospital administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility, or licensed medical professional corporation, based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, shall, except as provided in subsection (2), be commenced within 3 years after the date of injury or 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may such action be commenced after 5 years from the date of injury. However, this time limitation shall be tolled for any period during which there has been a failure to disclose any act, error, or omission upon which such action is based and which is known to the plaintiff or through the use of reasonable diligence subsequent to said act, error, or omission would have been known to him.

(2) Notwithstanding the provisions of 27-2-401, in an action for death or injury of a minor who was under the age of 4 on the date of his injury, the period of limitations in subsection (1) begins to run when the minor reaches his eighth birthday or dies, whichever occurs first, and the time for commencement of the action is tolled during any period during which the minor does not reside with a parent or guardian.

History: En. Sec. 1, Ch. 328, L. 1971; amd. Sec. 1, Ch. 191, L. 1973; R.C.M. 1947, 93-2624; amd. Sec. 1, Ch. 499, L. 1987; amd. Sec. 38, Ch. 83, L. 1989.

Cross-References

Montana Medical Legal Panel Act, Title 27, ch. 6.

27-2-206. Actions for legal malpractice. An action against an attorney licensed to practice law in Montana or a paralegal assistant or a legal intern employed by an attorney based upon the person's alleged professional negligent act or for error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

History: En. 93-2625 by Sec. 1, Ch. 220, L. 1977; R.C.M. 1947, 93-2625.

27-2-207. Injuries involving property. Within 2 years is the period prescribed for the commencement of an action for:

(1) injury to or waste or trespass on real or personal property;

(2) taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;

(3) killing or injuring stock by a railroad corporation or company.

History: Ap. p. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; Sec. 93-2607, R.C.M. 1947; Ap. p. Sec. 510, C.

EXHIBIT 7
DATE 2/2/95
HB 309

Chairman, Members of the committee:

For the record my name is Laurie Koutnik, Executive Director of Christian Coalition of Montana our states largest family advocacy organization.

Christian Coalition of Montana Supports HB 309.

From the beginning of the Health Care reform debate, our organization recognized the need for torte reform. From our initial conference with Governor Racicot on Health Care reform, he assured us that this issue would be addressed. All of us recognize that torte liability is one of the primary factors in driving up the cost of health care. So if we truly want "affordable" health care as prescribed in SB 285 - torte reform needs to be addressed.

Although we do not know exactly how much the torte system adds to our medical costs, it is perceived to be quite large when you take into account attorney fees, damage awards, court costs and all the unseen costs, such as defensive medicine practiced by doctors where extra tests are conducted out of fear of a lawsuit.

The medical torte liability alone is estimated to cost about $360.00 per year per household - far beyond what a family spends on routine preventive services.

In a report issued by the National Center for Policy Analysis, the torte system is referred to as "another bureaucracy, replete with its own perverse incentives. Moreover, it is a bureaucry that feeds off the health care sectors with little consideration of the damage it causes '.

And this is what Representative Grimes has addressed today - a framework to address this bureaucracy's damages and to reduce the liability aspect. Those with profit motivation would have you think otherwise.

In the Christian Coalition legislative candidate survey conducted prior to the November election, we asked you, the respondents your positions on torte reform in health care.

Overwhelmingly 94% of the respondents checked "supports" - the other 6% were " undecided". Some of you were concerned with the direction torte reform would take.

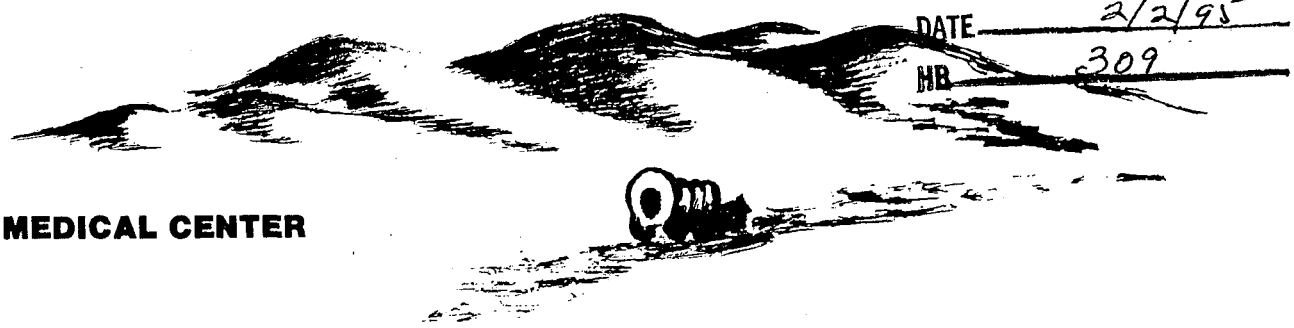
However, the Governor and his staff have thoroughly studied this issue and have in our opinion presented a fair plan.

If we are ever going to truly address cutting the runaway costs of health care, then torte reform is essential.

We recommend a do pass on HB 309.

Submitted : Laurie Koutnik, Executive Director, Christian Coalition of Montana

EXHIBIT 8
DATE 2/2/95
HB 309



BIG SANDY MEDICAL CENTER

P.O. Box 530 Big Sandy, MT. 59520 (406) 378-2188

January 27, 1995

The Honorable Roger DeBruycker
Montana House of Representatives
Capitol Station
Helena, MT 59620

Dear Representative DeBruycker:

Big Sandy Medical Center would like to support the passage of HB 309. This deals with reform of medical malpractice claims. It is no secret that malpractice and liability insurance is expensive and helps to drive the cost of health care upwards.

We feel that passage of a bill such as HB 309 would put some control on keeping claims reasonable if and when a person did have a legitimate claim. The present system encourages astronomical amounts to be sought in all cases, consequently driving up the price of insurance and health care costs.

Small rural hospitals in Montana are all operating on very fine margins even after receiving support from local tax payers. One of our greatest expenses is insurance. We feel that passage of HB 309 would afford us insurance relief while still protecting the rights of the health care consumers.

If my schedule allowed, I would testify at this hearing. However I am unable to do so, thus I would encourage you to submit this letter as testimony from Big Sandy Medical Center supporting HB 309.

Thank you.

Cordially yours,

Harry Bold

Harry Bold
Administrator

EXHIBIT 9
DATE 2/2/95
HB 309

February 2, 1995

House Judiciary / HB 309
Arlette Randash

Families across Montana have been impacted by the staggering costs of litigation and higher insurance premiums that result from product-liability and personal injury suits. It is estimated that the cost to the average household is $1,000 a year. As I followed the MHCA across the width and breadth of the state in its deliberations this past year, medical malpractice reform was a high a high priority on everyone's mind. In the electronic forums conducted by the MHCA in Glasgow, Kalispell, and Great Falls 81% of surveyed said reducing malpractice suits was either extremely important or important in health care reform. And the realities for Montana's families fall all to often on those of child bearing age. A acquaintance representing small business in eastern Montana told me that one of the remaining OB-GYN's in Billings recently told him that in 1977 he delivered 3 babies a year to pay his liability insurance. In 1994 it took him 60 babies to pay his liability insurance. No wonder rural Montana families find it difficult to find a doctor to deliver their babies, being forced to drive long distances to find good medical care.

You have undoubtedly felt intense pressure from the trial lawyers to gut or kill medical malpractice reform that is meaningful. I urge you to resist the pressure and give the careful scrutiny this bill deserves and favorable consideration to its passage. Montana's families deserve as much.

EXHIBIT 10
DATE 2/2/95
HB 309

Wheatland Memorial Hospital
and Nursing Home

530 - 3rd Street N.W.
Box 287
Harlowton, Montana 59036
406 632-4351

February 2. 1995

Re: HB309 - A Bill For An Act Entitled, "An Act Relating to Medical Malpractice Claims and Recoveries, Limiting Noneconomic Damages in Medical Malpractice Cases; Revising the Law relating to periodic payment of future damages in Malpractice Cases; . . . . .

Chairman Clark and Honorable Members of the Judiciary Committee:

My name is Diane Jones and I am a Registered Nurse and the Administrator for Wheatland Memorial Hospital and Nursing Home in Harlowton, Mt. Thankyou for allowing me this opportunity to share my views as a representative of rural health care perspective. I returned yesterday from Washington D.C. and the American Hospital Association meetings where 14 representatives from our Montana hospitals gained important information from our leaders on the National Level and shared our views and concerns for our State and the healthcare we proudly provide.

It was evident to me in our discussions with Senators Burns and Baucus and Rep. Williams (Representative) how deeply committed they are to supporting health care in Montana and how hard they are working to study and identify how proposal budget cuts to entitlement programs of Medicare and Medicaid can be done in such a manner that is fair and not devistating to the more rural states such as Montana.

Certainly there was also discussion of malpractice issues and the effects of skyrocketing costs on our physicians. Sadly it is unknown how soon decisive action will come on these issues on the National Level.

However, we in Montana, have an opportunity with HB309 to set a precedent and be a leader in bringing about positive change to limit the costs of malpractice insurance.

In 1987 we stopped providing labor & delivery services to our community when the rising costs of the malpractice insurance became too great for us to bear. We lost one of the most delightful and uplifting services hospitals can provide to other communities and now the 35 babies born each year to Wheatland County Moms and Dads are delivered in other counties. We then must work hard to reconnect these people into our local health care system so that the immunization of the children and follow up of the family unit is not lost in the system and sometimes it is because of the lack of overall continuity.

From 1990 to 1992 our community was without permanent physicians~ The question would need to be asked if those 2 years without permanent Docs could be at least in part because of ~~today~~ the physician's concern about

Wheatland Memorial Hospital
and Nursing Home

530 - 3rd Street N.W.
Box 287
Harlowton, Montana 59036
406 632-4351

the isolation of rural practice and the difficult decisions made 90 miles from specialists, practicing essentially alone. Coupling that issue with the tremendous responsibilities of providing care while facing a continually litigeous society is indeed quite a challenge.

The very reasonable and responsible approach of HB 309 to limit the noneconomic damages is an excellent measure to provide some necessary structure to a system that must be restructured if we would expect to retain physicians in our communities and continue to try to afford the costs of malpractice insurance.

Thankyou for your time and serious consideration of HB309

Dana Jones RN
Administrator

EXHIBIT 11
DATE 2/2/95
HB 309

February 9, 1995

Rep. Robert Clark, Chairman
House Judiciary Committee
Capitol Building
Helena, MT 59620

Re: House Bill No. 309

Dear Rep. Clark:

Enclosed for your consideration are the following:

(1) That portion of Health Care for Montanans, Phase II: Steps to Implementation dated October 7, 1992, addressing physician's liability.

(2) Report prepared by Gerald J. Neeley for the Montana Medical Association entitled, "Montana Board of Medical Examiners Data."

(3) Appendix to report prepared by Gerald J. Neeley for the Montana Medical Association entitled, "Montana Board of Medical Examiners Data."

Sincerely,

MONTANA MEDICAL ASSOCIATION

Jerome T. Loendorf

jw
Enclosures

EXHIBIT 11
DATE 2-2-95
HB 309

PHASE II: STEPS TO IMPLEMENTATION

Governor Stan Stephens

October 7, 1992

Part A and Part B

The original of this document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

(unbound report)

HEALTH CARE FOR MONTANANS

EXHIBIT 12
DATE 2/2/95
HB 309

"Repeater" Physicians

Montana Board of Medical Examiners
Claims Data 1984-1992

1. 295 Claims Paid From 1984-1992

2. Claim Payments Made on Behalf of 231 Physicians (15% of Total Active)

3. Multiple Claims Paid on Behalf of only 51 Physicians (Less than 4%)

4. Thirty Nine Percent (39%) of Claims Paid on Behalf of Multiple Claim Physicians

5. Fifty Eight Percent (58%) of Dollar Total of Claims Paid on Behalf of Multiple Claim Physicians

---

Fewer Than 4% of Active Montana Physicians Are Responsible For 40% of the Claims Paid and Nearly 60% of the Dollar Loss Requiring Compensation

HB 309: Solution to a Non-existent Problem

<u>In Montana, Civil Filings Are Down More Than Ten Percent</u>

Civil case filings dropped in Montana both in 1992 and 1993. In 1993, 10.5% fewer civil cases were filed in our state courts than in 1991. In half of the districts, civil filings dropped both in 1992 and 1993. Montana Supreme Court Judicial Reports, 1991-93. ***This rate of decrease is five times greater than the national trend.*** State Court Caseload Statistics: Annual Report 1992, at 16-17, National Center for State Courts. In Montana's federal courts, fewer civil cases have been filed each year since 1991 and the number of pending civil cases has decreased more than 14%.

<u>Only Five Percent of Montana's Civil Cases Are Tort Cases</u>

In Montana, personal injury cases comprise only about 5% of the total number of cases filed each year. (Montana Supreme Court Statistics, years 1987 and later.) Most cases involve crime, domestic relations, debt collection, estates and probate.

<u>In Montana, Defendants Win Nearly 60% of All Civil Trials</u>

From January 1 through November, 30 1994, a total of 84 civil jury verdicts were reported from the state courts. Defendants won 48 of these verdicts (57%.) During the same period, 18 civil jury cases were tried in the Montana federal courts. Defendants won 10 of these (56%). (Data compiled from the Montana Law Week).

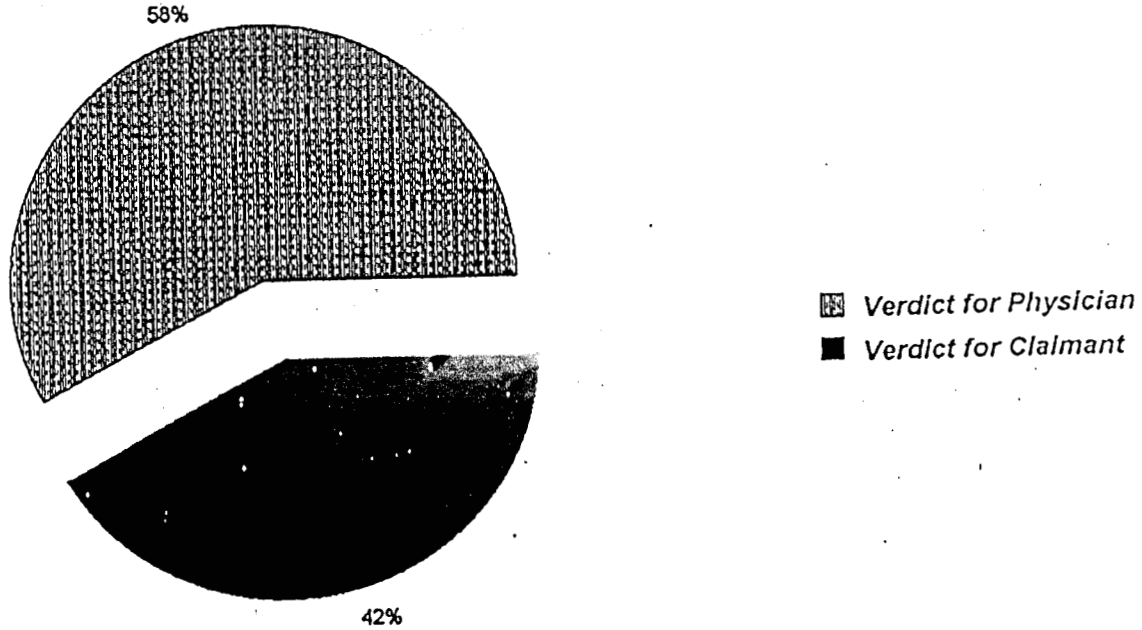
<u>Montana's Doctors Win In Court Nearly 80% of the Time</u>

Doctors won at trial in 15 of the 19 cases tried in Montana in the last ten years. *(That's right, according to the Montana Insurance Department and the Montana Legislative Counsel, **only 19 doctor negligence cases have been tried in all of Montana in the last ten years.)***

If It Ain't Broke, Don't Fix It!
Say No To More Government Interference
Vote No! on HB 309

EXHIBIT 12
DATE 2-2-95
HB 309

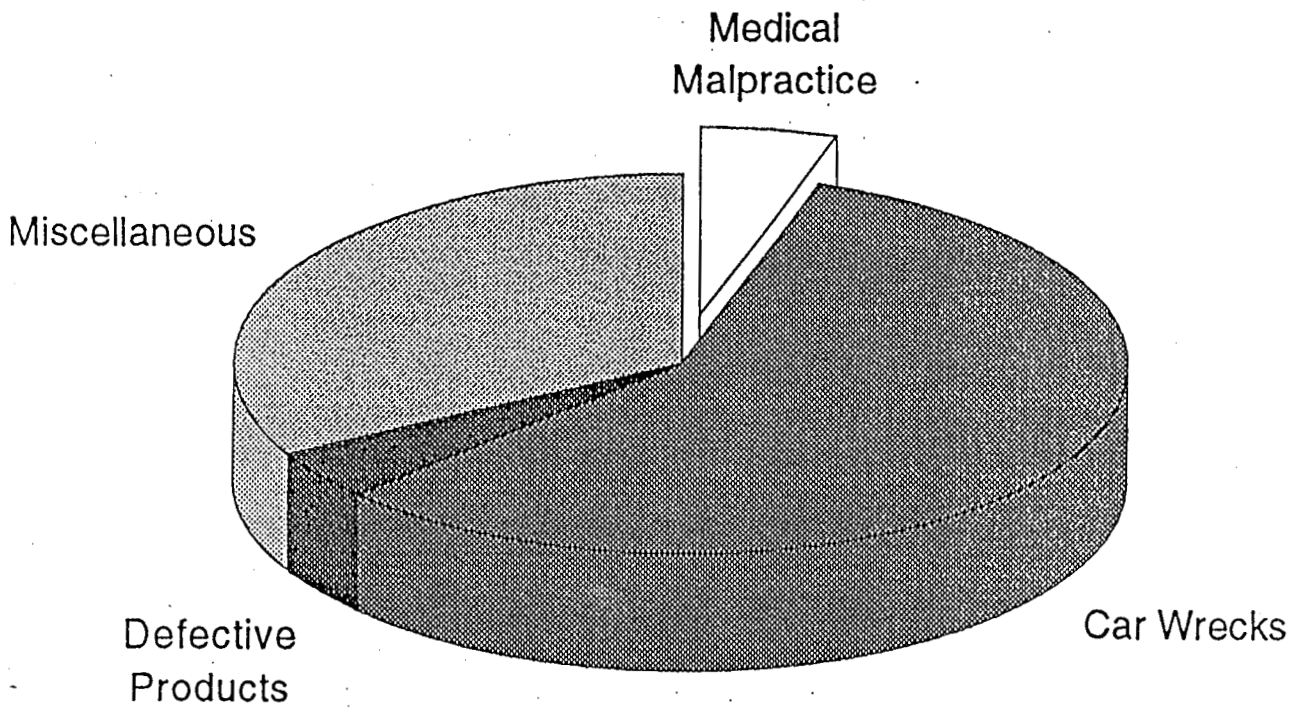
EVEN WHEN PHYSICIAN CONDUCT IS INDEFENSIBLE . . .



Findings based on a survey of 8,231 closed medical negligence claims involving 12,829 physicians insured by The New Jersey Medical Insurance Exchange from 1977 to 1992. According to the insurer's own internal evaluations, approximately 25 percent of those claims involved "indefensible" physician care, with physicians admitting liability in almost half of those cases. Yet whenever those "indefensible" cases went to a court verdict, physicians usually won. Results published in the November 1992 issue of *Annals of Internal Medicine*, Vol. 117, No. 9, and copyrighted by the American College of Physicians, 1992.

Composition of Tort Filings

General Jurisdiction Courts (1991)



National Center for State Courts (1991)

EXHIBIT 12
DATE 2-2-95
HB 309

HB 309: DAMAGE CAPS

Damage caps punish only the most severely injured Montanans, especially those who are paralyzed, brain-damaged, or otherwise incapacitated. The more severe the injury, the greater the likelihood that damage caps will leave these Montanans financially dependent upon society -- and burden Montana taxpayers.

Disfigurement, blindness, paralysis, loss of unborn children, loss of reproductive capacity or sexual function, destruction of the family unit and severe depression are just a few examples of non-economic damages. If an inept physician or careless hospital causes you, a member of your family or one of your constituents to live forever with such a loss, shouldn't compensation be paid by the guilty party? Each person and each case is different. The common sense of Montana citizen jurors are best able to hear the evidence and decide how much should be paid to compensate for the loss, based upon the particular evidence presented in the case. *You were elected because Montanans do not want the heavy hand of government taking control of their lives and their decisions.*

The Montana Medical Association, in its extensive 1988 reports on obstetrical care in Montana, concluded that a flat-dollar limit on damages is "misguided for a number of reasons. It doesn't work, is often held unconstitutional, and impacts more severely on the people who are injured the most." ("Who's Going to Deliver Your Baby: The Loss of Obstetrical Services in Montana -- Revised," June 1988, p. 19).

Wisconsin capped non-economic damages in medical-negligence cases at $1 million in 1985 and abandoned caps at the end of 1991 after six years of unsatisfactory results (*National Law Journal,* November 16, 1992, p. 37).

A 1991 report by Washington's insurance commissioner Richard Marquardt to that state's legislature denied that "tort reform" changes were responsible for stabilizing rates and increased availability of coverage. To the contrary, a 1989 law requiring insurers to consider investment income in setting rates was projected to have a much greater impact on insurance rates than changes in the tort system. ("A Study of the Effect of Tort Reform on Insurance Rates and Availability and Its Impact on the Civil Justice System," Report to the Washington State Legislature, January 1991).

Wayne Schile, publisher
Richard J. Wesnick, editor
Gary Svee, opinion editor
Tuesday, January 31, 1995

Exception proves rule

Punitive damages rare in medical malpractice cases

REMEMBER WHEN Gary Hart was running for the presidency, and he dared the press to find any wrongdoing on his part — and the press did?

This session of the Legislature, the Montana Trial Lawyers Association challenged the public to find any evidence that punitive damages had been assessed in state medical malpractice cases — and the public did.

But the one exception proves the trial lawyers' rule: Punitive damages are almost non-existent in medical malpractice cases in Montana. What's more, in recent years, most insurance companies have dropped punitive damage coverage entirely.

So removing punitive damages will accomplish little in reducing medical malpractice insurance costs.

Perhaps the Legislature should look elsewhere for the culprit of climbing health-care costs, including the high administrative costs of private insurors, even though that's not nearly so easy, nor so popular, as blaming the health-care crisis on lawyers.

EXHIBIT

DATE 2/2/95

HB 309

MONTANA STATE SENATE

SENATOR DELWYN GAGE
SENATE DISTRICT 5
HOME ADDRESS:
BOX 787
CUT BANK, MONTANA 59427

COMMITTEES:
TAXATION
BUSINESS & INDUSTRY
RULES

CAPITOL STATION
HELENA, MONTANA 59620
PHONE (406) 444-4800
HOME PHONE (406) 873-4662

Jan. 31, 1995

To: House Judiciary Committee

Re: HB309

Since I was the chairperson of the Interim study on insurance this last interim I would like to share some observations with the members of your committee. I have three bills before the Senate Business and Industry Committee today or I would present this testimony in person. I will be happy to appear before your committee to respond to any questions your committee members may have regarding this testimony if you will let me know when you would like me to appear.

These observations are my own and do not necessarily reflect the opinions of other committee members or the committee as a whole.

It is my opinion that the reason the committee did not make any kind of recommendations regarding caps on non-economic damages is that we did not have sufficient information upon which to conclude that if caps are placed on non-economic damages or if caps are placed on legal fees that malpractice insurance premiums would go down. There was some indication that in states where caps have been put in place the premiums for malpractice insurance have decreased within a couple of years or so. However there are a number of factors involved in the computation of insurance rates and it is my opinion that the committee could not determine how large a factor caps were in the reduction of rates in those instances where rates did decrease.

One other factor that I want to bring to the attention of your committee is the rate making process. We had about a 2½ hour presentation by a person who was deemed to be a specialist in this field. He told us that the population and incidence of malpractice in Montana is not statistically sufficient to write rates specific to Montana so our data is grouped with data from other areas to compute rates for our area. I have been told however that there is at least once company who does rate Montana specifically on data from Montana only. The specialist did however state that one area that is considered for each state is the individual statutes of the state that may have an affect on claims.

It would be extremely beneficial to your deliberations if you could get that person to address your committee on rate making in the area of state statutes on caps. You can get that persons name I am sure from Susan Fox or Connie ERickson who staffed our committee. You might also wish to read the report from the Insurance Study Committee for further insight on this matter. Thank you.

Senator Del Gage, Dist. 43

MEDICAL MALPRACTICE

EXHIBIT 14
DATE 2/2/95
HB 309

Directors:
Wade Dahood
Director Emeritus
[illegible]te D. Beck
Elizabeth A. Best
Michael D. Cok
Mark S. Connell
Michael W. Cotter
Patricia O. Cotter
Karl J. Englund
Robert S. Fain, Jr.
Victor R. Halverson, Jr.
Gene R. Jarussi
Peter M. Meloy
John M. Morrison
Gregory S. Munro
David R. Paoli
Michael E. Wheat

Montana Trial Lawyers ASSOCIATION

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President
Michael E. Wheat
President-Elect
Gene R. Jarussi
Vice President
John M. Morrison
Secretary-Treasurer
William A. Rossbach
Governor
Paul M. Warren
Governor

February 2, 1995

Rep. Bob Clark Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59620

RE: HB 309

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to HB 309, which imposes severe caps on non-economic damages in medical-negligence cases and allows careless doctors and hospitals to pay compensation in installments.

MTLA agrees with the findings of Sen. Del Gage's Joint Interim Subcommittee on Insurance Issues:

> "The data does not support claims that there is a medical malpractice crisis in Montana. Professional liability insurance for health care providers is available at competetive rates. Very few claims result in lawsuits, and those that do are settled, more often than not, in favor of the defendant." (Page 41)
>
> "After 12 months of study, the Subcommittee concluded that the evidence presented to the Subcommittee did not support the contention that there was a medical malpractice crisis in Montana that warranted the passage of specific tort reform measures. Further, no evidence was presented that supported the contention that the passage of tort reform measures would result in health care cost savings, either to health care providers or consumers." (Page 64)

Background. Montana does not need HB 309:

1. Medical malpractice accounts for less than one percent of Montana's annual health care bill. If absolutely all liability for medical malpractice were abolished and all

health care providers were somehow completely protected from frivolous lawsuits, the price of a $40 office visit would decline *approximately 25 cents.*

2. The absence of doctors in rural areas of Montana is *not* attributable to medical liability premiums. HB 309, by benefitting far more urban doctors and specialists than rural doctors, will *not* improve rural access.

3. The number of Montana doctors, including family physicians and OB-GYNs, is *increasing.* Montana's health-care industry is growing vigorously.

4. The average Montana doctor earned well more than $100,000 last year, even *after* they paid all liability premiums and other expenses. *Montana doctors pay a smaller proportion of their net income for liability insurance than Montana truckers do.*

5. Three factors more than any other influence the liability premiums paid by Montana doctors: first, the potentially *catastrophic nature* nature of injuries caused by medical malpractice; second, the *small pool of providers* among which to spread the insurance costs of those injuries; and third, the *refusal of medical-liability insurance companies* to raise premiums for repeatedly careless doctors or lower premiums for rural doctors who treat fewer patients.

6. *Only one in 16 victims of medical malpractice receive compensation for their injuries.* In fact, *even in cases where the liability insurer labels the doctor's conduct indefensible,* victims who go to trial lose as often as they win.

7. The costs of medical malpractice insurance are determined by the costs of medical malpractice. *More Montanans die every year because of medical malpractice than because of traffic accidents.*

8. Montana doctors and their insurance companies choose to settle the vast majority of malpractice claims, often in order to keep those settlements confidential. Since 1984, *fewer than 5 percent of Montana doctors* have paid multiple malpractice claims, yet that minority has accounted for *40 percent of all malpractice settlements* and *60 percent of all payments* to malpractice victims. One doctor, for example--identified by the Montana Board of Medical Examiners only as Doctor 43--settled with malpractice victims for $600,000 in 1986, $391,000 in 1989, and $105,000 in 1992. *Yet the patients of Doctor 46 have no right to that information.*

9. Doctors grossly misperceive the threat of malpractice suits. Consequently, HB 309 will not reduce the "bad defensive medicine" which results from doctors' exaggerated, persistent misperceptions about legal liability. HB 309 will, however, reduce the "good defensive medicine" which ensures quality care and lowers the cost of medical accidents.

10. The proposals contained in HB 309 differ significantly from statutes in California, Colorado, and other states. The proposals in HB 309 have not reduced

EXHIBIT 14
DATE 2-2-95
HB 309

medical liability premiums or payments to malpractice victims, restrained overall health care costs, or improved access to medical care in other states.

11. Montana has already enacted numerous so-called tort reform proposals at the request of health care providers, including drastic reductions in the statutes of limitations applicable to children (1987 and 1989); mandatory screening panels which require victims to await action by an administrative panel before filing suit (1977); immunity for negligent providers when the victim happens to be the patient of a direct-entry midwife (1989); and immunity for providers who render negligent emergency care in emergencies without compensation (1987). The proponents of HB 309 weren't satisfied by these so-called tort reforms. They ignore the absence of similar "reforms" in California, Colorado, and other states. And they won't be satisfied with HB 309.

HB 309. The bill itself works complex and unjust hardship on the victims of medical negligence:

1. Section 1, which caps non-economic damages, ***abandons the recommendation of Governor Stephens' Health Care for Montanans Committee that any such caps exclude non-economic damages for physical impairment and disfigurement.***

2. Section 1 actually reduces those damages ***far below $250,000*** whenever multiple victims or multiple health-care providers are involved.

3. Section 1 requires that *other* statutory reductions already required by Montana law (i.e., Secs. 27-1-702 and 27-1-703, MCA) must be applied ***after, not before,*** the application of the new $250,000 cap. In other words, $250,000 is merely a *theoretical* cap--most awards will actually be far smaller.

4. Section 1 particularly ***disadvantages women and children***, who use--and need--the majority of health care services. Women and children often cannot demonstrate the economic damages associated with loss of long-term, high-paying employment, and they suffer more from such non-economic injuries as disfigurement, humiliation, emotional distress, and sterility.

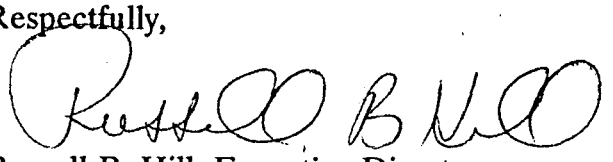
5. Section 2 ***prevents a jury from considering*** the consequences of their decision.

6. Sections 2 and 3, which mandate periodic payment of future damages at the request of a careless provider or liability insurer, imposes additional burdens on those few victims of medical malpractice who survive litigation. Many claimants and providers voluntarily agree to periodic payments now. And ***Montana law already permits judges to order periodic payments*** when they are in the best interest of the victim.

7. By forcing successful claimants to bear the risk of insurance-company insolvency, Sections 2 and 3 allow a careless provider or liability insurer to shift costs onto the victim of medical negligence--or, more often, ***onto Montana taxpayers.***

Thank you for considering these comments and the accompanying materials. If I can provide additional information, verification, or assistance, please contact me.

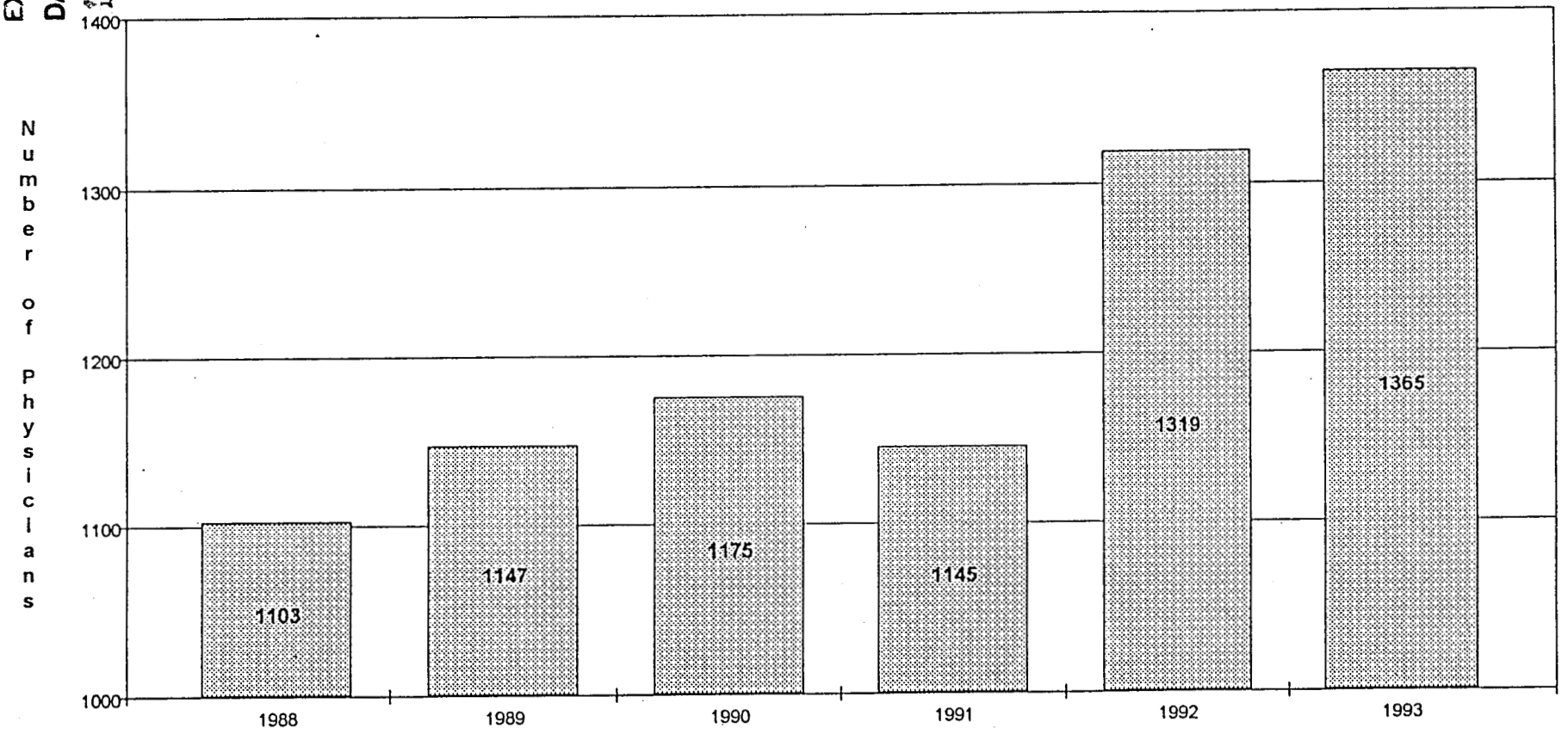
Respectfully,



Russell B. Hill, Executive Director

EXHIBIT 14
DATE 2-2-95
HB 309

ACTIVE MONTANA PHYSICIANS, 1988-1993



Based on assessments reported by the Montana Medical-Legal Panel

EXHIBIT 14
DATE 2-2-95
HB 309

MEDICAL MALPRACTICE AND TORT REFORM: ISSUES OF INSURANCE COSTS, COVERAGE, CAPS, AND COMPENSATION

A Report to the 54th Legislature

from the

JOINT INTERIM SUBCOMMITTEE ON INSURANCE ISSUES

Prepared by

Connie F. Erickson, Staff Researcher

and

Susan Byorth Fox, Staff Researcher

November 1994

Published by

Montana Legislative Council

Room 138, State Capitol

Helena, MT 59620-1706

(406) 444-3064

The original of this document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

(unbound report)

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on February 10, 1995, at 7:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: None

Members Absent: None

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	HB 382, HB 378, HB 388, HB 444
Executive Action:	HB 309 DO PASS AS AMENDED
	HB 323 DO PASS AS AMENDED
	HB 444 DO PASS AS AMENDED

{Tape: 1; Side: A;}

EXECUTIVE ACTION ON HB 309

Motion: REP. DUANE GRIMES MOVED HB 309 DO PASS.

Motion: REP. LOREN SOFT MOVED TO AMEND. EXHIBIT 1

Discussion: REP. BRAD MOLNAR asked why each health care provider was listed individually rather than just by the term, health care provider.

REP. SOFT explained the reasoning behind that decision.

John MacMaster read the current definition of health care provider in code.

REP. MOLNAR asked if there were more categories listed under the definition in code than were included in this bill.

John MacMaster said the intent in prior submissions of this bill to the committee was to confine the application of it to limited members of the health care field.

Vote: The motion carried 11 - 8 by roll call vote.

Motion: REP. DIANA WYATT MOVED TO AMEND. EXHIBIT 2

Discussion: REP. WYATT explained that the amendments would authorize the Insurance Commissioner to determine the results and to report what has happened in rate structure and occurrences.

REP. GRIMES felt this would give one of the strongest opponents opportunity to "get in the middle of the bill." He did not think it made sense to turn any control over to him and or to require something of him that isn't required of any other person who testifies. He said it was clear what would happen if rates do not go up; they will eliminate that section of the law.

REP. DEB KOTTEL said she heard during the hearing that the reason for this was to have doctors' insurance rates drop. The testimony was that it was not to lower health care costs. She read into the record portions of a letter from **SEN. DEL GAGE**, who chaired the Medical Malpractice Reform Committee. His opinion was that the committee could not determine how large a factor caps were in the reduction of rates in those instances where the rates did decrease. She felt that if this bill was an experiment to see if caps reduce insurance rates, then she thought they need to follow it by adopting this amendment.

REP. GRIMES said this bill is not an experiment. He said it was good tort reform which had been passed in other states.

REP. WYATT speaking on her amendment, said that there is currently no statutory authority to report loss experiences. She felt there is insufficient information in terms of Montana data to determine credible loss experiences here. She said the amendment does not preclude the bill's coming into effect or prevent the tort reform. It would merely give information to evaluate the bill's effectiveness.

REP. GRIMES believed there would be several groups and entities watching the effectiveness of the bill which would serve the same purpose. He did not believe it was wise to add it to the Insurance Commissioner's work load and believed that there would be plenty of data in two years from other sources.

REP. SHIELL ANDERSON asked the committee to vote against the amendment. He did not like it when departments try to buttress their responsibilities. He felt the amendment should have a fiscal note attached to it. If the commissioner's job is to monitor insurance, he did not understand why he could not do this anyway without a request for more rule making authority.

Vote: **The motion failed 6 - 13 by roll call vote.**

Discussion: **REP. WILLIAM BOHARSKI** said sometimes when a bill is passed like this, there can be questions from the court about why the legislature did it. He wondered if it would be appropriate to add some "whereas" clauses to show clear legislative intent. He remembered that is sometime done in tort reform bills.

REP. GRIMES felt that would not be a bad idea, but because of time constraints and the need for the committee to come into agreement about what those clauses would say, he did not agree that they should add them. He felt he would also have to research the other states' clauses. He did not see any problem applying this law. He asked if **REP. BOHARSKI** thought there might be a problem determining periodic payment schedules.

REP. BOHARSKI also did not think they should do it in committee, but was wondering if it was something they ought to think about. He said the court's response to bills limiting liability were unpredictable. He only wanted to propose it to the committee for consideration.

Motion: **REP. ANDERSON MOVED HB 309 DO PASS AS AMENDED.**

Discussion: **REP. DANIEL MC GEE** was concerned that the bill limited awards to injured persons but did not limit premiums or awards to attorneys. He understood the economic logic behind it. But he saw the only person being limited by it was the person suffering the loss.

REP. ANDERSON believed the attorneys' fees would be limited by virtue of the cap on the noncompensatory damages because they would only take a portion of a smaller amount.

REP. MC GEE said he did not believe they would compute their fee on the $250,000 cap, but would also include compensatory, punitive, and non-compensatory damages in the computation. He felt the $250,000 could be absorbed in attorney fees.

REP. LIZ SMITH felt the main crux of it was noneconomic damages in that it was something which could not be tied to a dollar amount. Therefore, she felt capping and periodic payments were where the support for the plaintiff was provided. Also, in that process there was a reduction of litigation time and a greater support for those incurring long-term economic damages. Because there was no dollar amount on noneconomic damages, it would be more up-front money generated to the plaintiff rather than to the attorney.

REP. MC GEE said his position was that a dollar amount cannot be assigned to pain, suffering, or reputation. He said they were dealing with non-tangibles and he wanted to see that the bill would guarantee reduced premiums or some positive benefit to the person incurring the loss rather than to an attorney.

REP. KOTTEL discussed some components involved in examining tort reform; i.e., identifying the problem, asking if the bill would solve the problem, and asking if in the attempt to solve it would more problems be created. She outlined the problem as stated in testimony as being medical malpractice crisis. She quoted from the 54th Interim Subcommittee Report On Insurance Issues which indicated that there is no medical malpractice crisis in Montana and that professional insurance for health care providers is available at competitive rates. It reported as well that claims are settled in favor of the defendant with those cases rarely being settled in the multi-million dollar range. **EXHIBIT 3**

She quoted from **SEN. GAGE'S** letter that it was his opinion that the reason the committee did not make any kind of recommendation regarding caps for noneconomic damages was that they did not have sufficient information to reach a conclusion that if caps were placed on noneconomic damages or on legal fees, that malpractice insurance premiums would be reduced.

However, assuming there is a problem, she referred to the above testimony to answer the second part of tort reform; i.e., would they solve the problem. Additionally, there was no proof that the number of physicians would increase as a result or that there was indeed a current shortage. In fact, **EXHIBIT 4** was entered as evidence that there is a steady increase in the numbers of active Montana physicians. The third problem was purported to be a lack of physicians in rural areas and no testimony was convincing that a decrease in rates would increase the numbers of doctors willing to practice in rural areas. Any evidence that it would decrease the amount of health care costs to the average Montanan was not presented at the hearing as she remembered it.

On the testimony that fewer than 4% of active Montana physicians are responsible for 40% of the claims and 60% of the dollars lost requiring compensation, she questioned that this would settle that problem. She questioned whether they would create more problems with this legislation. She gave examples to support her view as it related to noneconomic loss with persons who are not producing economically in the society.

REP. BILL TASH said the thread that runs under concerns with regard to health care costs is the absolute need for tort reform. Though he did not see this as a cure-all, he did see it as a step toward being containing some of the costs. He begged to differ with the viewpoint that there is no problem in recruitment and retention for physicians in rural areas; his experience proved otherwise.

REP. SOFT asked the committee to remember that in periodic payment through annuities, the attorney fees would be based on the current value of the annuity and not on the total amount. In effect, the attorney would receive less and as the annuity payments are made over the lifetime of the person with interest.

REP. WYATT rebutted **REP. TASH'S** statements by stating that in recent testimony it was learned that Montana ranks number three in the recruitment and retention of physicians out of Washington University. Montana is third nationally in retention for many reasons. Though there are under-representations in areas of rural Montana, some of those are for reasons which have no relationship to the bill.

REP. MC GEE proposed an amendment and described it to the committee. He felt the court should rule in context with the injured person as well as the insurance company.

Motion: REP. MC GEE MOVED TO AMEND HB 309 TO CHANGE "SHALL" ON LINE 26 TO "MAY."

Discussion: REP. BOHARSKI said, "These are people who have already been reimbursed for the actual loss due to an injury. The reason this is a shall, you are exactly right, so the insurance company and physician can come in and say, 'I need periodic payments. This is going to kill me if I have to put this kind of money out.' There are some things that need to be left to the discretion of the judge when a criminal case appears before his court ....." But he felt this was a decision the legislature had to make. Every state is trying to figure out a way to bring these costs down. If it is turned over to some liberal judges, he guaranteed they would never make it into a "shall" but would say they have to pay the whole amount up front. He strongly urged the committee's vote against the amendment because it would gut the second half of the bill.

REP. GRIMES said **REP. BOHARSKI'S** comments were absolutely right and that there is current language in the law which allows for

some periodic payments though they are never used because it is at the discretion of the judge. This would help stabilize the fact that they are going to be paid periodically. He felt the amendment would reverse his intention. This would allow the victims to be paid out of current value. He gave an example to support his statement.

REP. SOFT thought that payment up front caused insurance companies to carry large reserves, but periodic payments would alleviate that problem.

Vote: **The amendment motion failed by voice vote.**

Vote: **The DO PASS AS AMENDED motion carried 13 - 6 by roll call vote.**

Informational Testimony: A letter with accompanying documents was referred to in Executive Action and is included as **EXHIBIT 5.**

EXHIBITS 6 through 24 are letters received after the hearing in support of HB 309.

EXECUTIVE ACTION ON HB 323

Mr. MacMaster read the proposed amendments to HB 323 and a companion bill, HB 232, to the committee for their information before action was entertained on HB 323. The two bills were essentially the same, except that HB 323 required a letter from the sheriff saying the bearer had a concealed weapons permit to be shown to the seller of the handgun. He explained the coordination instruction which would be included and the need for it.

CHAIRMAN CLARK discussed **REP. RYAN'S** proposed amendment to strike all of section 1 through line 16 and also on line 17 to strike, "a letter issued under subsection (1), the."

Motion: **REP. MC GEE MOVED HB 323 DO PASS.**

Motion: **REP. MC GEE MOVED THE RYAN AMENDMENTS TO HB 323.**

Discussion: **CHAIRMAN CLARK** noted that the word, "the," should remain on line 17.

Motion/Vote: **REP. MC GEE MOVED A SUBSTITUTE AMENDMENT AS OUTLINED IN EXHIBIT 25. The motion carried 16 - 2, REPS. HURDLE and SHEA voted no.**

Motion/Vote: **REP. BOHARSKI MOVED HB 323 DO PASS AS AMENDED. The motion carried 15 - 3, REPS. CAREY, SHEA and HURDLE voted no. (REP. ANDERSON voted by proxy and REP. KOTTEL was absent at the time of the vote.)**

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 2/10/95 BILL NO. HB309 NUMBER Soft Amendments

MOTION: As Attached as Exhibit 1

NAME	AYE	NO
Rep. Bob Clark, Chairman	✓	
Rep. Shiell Anderson, Vice Chairman, Majority	✓	
Rep. Diana Wyatt, Vice Chairman, Minority		✓
Rep. Chris Ahner	✓	
Rep. Ellen Bergman	✓	
Rep. Bill Boharski	✓	
Rep. Bill Carey		✓
Rep. Aubyn Curtiss	✓	
Rep. Duane Grimes	✓	
Rep. Joan Hurdle		✓
Rep. Deb Kottel		✓
Rep. Linda McCulloch		✓
Rep. Daniel McGee		✓
Rep. Brad Molnar	✓	
Rep. Debbie Shea		✓
Rep. Liz Smith		✓
Rep. Loren Soft	✓	
Rep. Bill Tash	✓	
Rep. Cliff Trexler	✓	

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 2/10/95 BILL NO HB309 NUMBER Wyatt Amendments

MOTION: As attached as Exhibit 2

NAME	AYE	NO
Rep. Bob Clark, Chairman		✓
Rep. Shiell Anderson, Vice Chairman, Majority		✓
Rep. Diana Wyatt, Vice Chairman, Minority	✓	
Rep. Chris Ahner		✓
Rep. Ellen Bergman		✓
Rep. Bill Boharski	✓	✓
Rep. Bill Carey	✓	
Rep. Aubyn Curtiss		✓
Rep. Duane Grimes		✓
Rep. Joan Hurdle	✓	
Rep. Deb Kottel	✓	
Rep. Linda McCulloch	✓	
Rep. Daniel McGee		✓
Rep. Brad Molnar		✓
Rep. Debbie Shea	✓	
Rep. Liz Smith		✓
Rep. Loren Soft		✓
Rep. Bill Tash		✓
Rep. Cliff Trexler		✓

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 2/10/95 BILL NO. HB309 NUMBER _____

MOTION: Do Pass As Amended

NAME	AYE	NO
Rep. Bob Clark, Chairman	✓	
Rep. Shiell Anderson, Vice Chairman, Majority	✓	
Rep. Diana Wyatt, Vice Chairman, Minority		✓
Rep. Chris Ahner	✓	
Rep. Ellen Bergman	✓	
Rep. Bill Boharski	✓	
Rep. Bill Carey		✓
Rep. Aubyn Curtiss	✓	
Rep. Duane Grimes	✓	
Rep. Joan Hurdle		✓
Rep. Deb Kottel		✓
Rep. Linda McCulloch		✓
Rep. Daniel McGee	✓	
Rep. Brad Molnar	✓	
Rep. Debbie Shea		✓
Rep. Liz Smith	✓	
Rep. Loren Soft	✓	
Rep. Bill Tash	✓	
Rep. Cliff Trexler	✓	

EXHIBIT 1
DATE 2/10/95
HB 309

February 7, 1995

Proposed Amendments to House Bill 309

1. Page 2, line 10.
Following: "dentist,"
Strike: "remainder of line 10 and line 11 in their entirety
Insert: "podiatrist, optometrist, chiropractor, physical therapist, or nurse licensed under Title 37, or a health care facility licensed under Title 50, chapter 5."

2. Page 2, Line 12.
Following: "'Malpractice claim'"
Strike: the remainder of line 12 in its entirety
Insert: "means a claim based on a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death."

Pat Melby
Montana Optometric Association
Montana Podiatric Medical Association

EXHIBIT 2
DATE 2/10/95
HB 309

Amendments to House Bill No. 309
First Reading Copy

Requested by Rep. Wyatt
For the Committee on the Judiciary

Prepared by John MacMaster
February 9, 1995

1. Title, line 8.
Strike: "SECTION"
Insert: "SECTIONS"
Following: "25-9-403"
Insert: "AND 33-16-202"

2. Page 4, line 11.
Following: line 10
Insert: "**Section 4.** Section 33-16-202, MCA, is amended to read:

"**33-16-202. Recording and reporting of loss and expense experience.** (1) The commissioner shall promulgate and may modify reasonable rules and statistical plans, reasonably adapted to each of the rating systems used, and which shall thereafter be used by each insurer in the recording and reporting of its loss and countrywide expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as may be necessary to aid him in determining whether rates comply with the applicable standards of this chapter. Such rules and plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state and are not susceptible of determination by a prorating of countrywide expense experience.

(2) In promulgating such rules and plans, the commissioner shall give due consideration to the rating systems in use in this state and, in order that such rules and plans may be as uniform as is practicable among the several states, to the rules and to the form of the plans used for such rating systems in other states. No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system used by it.

(3) The commissioner may designate one or more rating organizations or other agencies to assist him in gathering such experience and making compilations thereof, and such compilations shall be made available, subject to reasonable rules promulgated by the commissioner, to insurers and rating organizations.

(4) The commissioner may by rule require each insurer writing medical malpractice insurance in this state to annually report its Montana loss experience and exposure to one or more rating organizations designated by the commissioner.""

Renumber: subsequent sections

EXHIBIT 3
DATE 2/10/95
HB 309

MEDICAL MALPRACTICE AND TORT REFORM: ISSUES OF INSURANCE COSTS, COVERAGE, CAPS, AND COMPENSATION

A Report to the 54th Legislature
from the
JOINT INTERIM SUBCOMMITTEE ON INSURANCE ISSUES

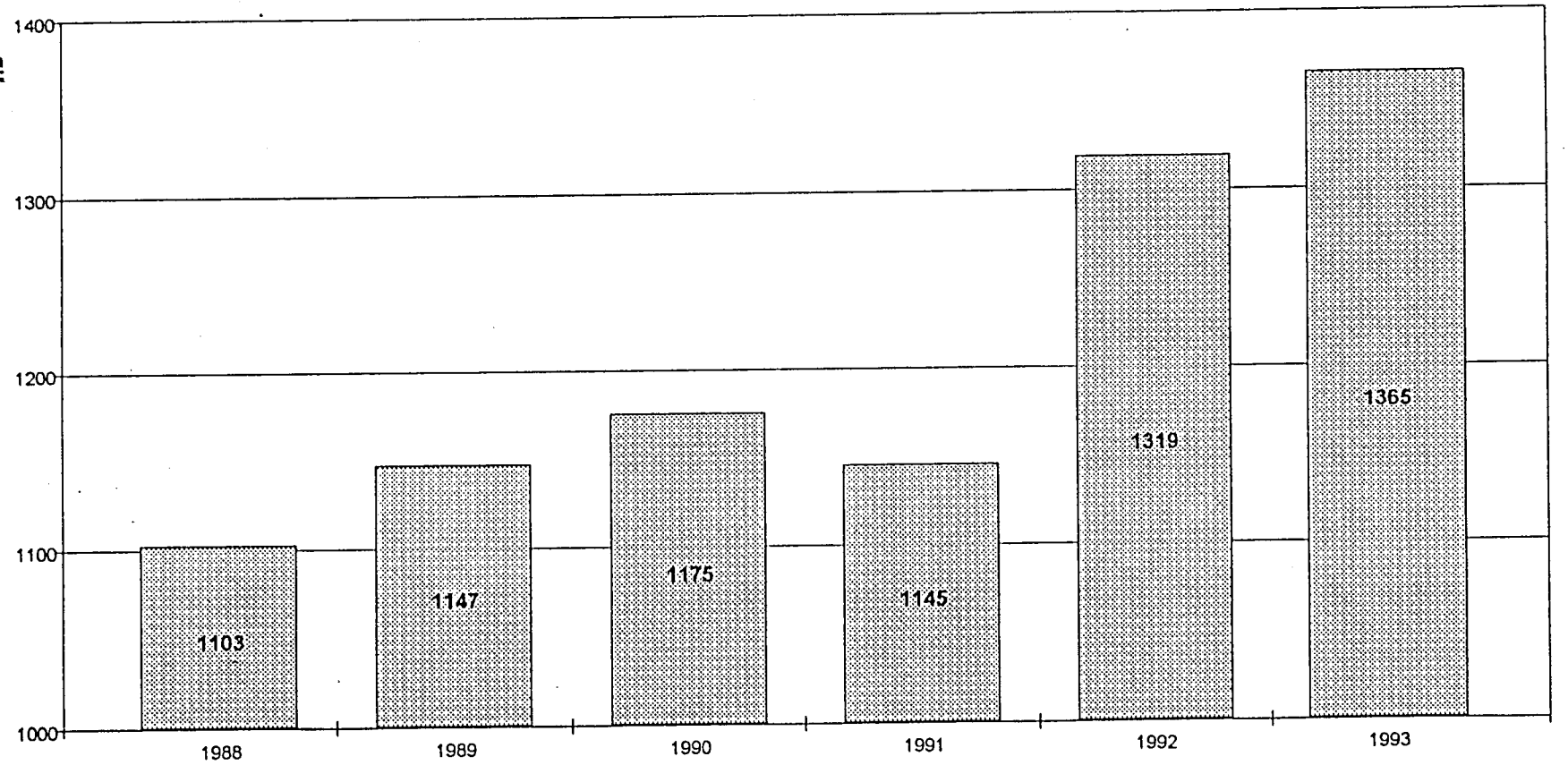
Prepared by
Connie F. Erickson, Staff Researcher
and
Susan Byorth Fox, Staff Researcher

November 1994

Published by
Montana Legislative Council
Room 138, State Capitol
Helena, MT 59620-1706
(406) 444-3064

EXHIBIT 4
DATE 2/10/95
HB 309

ACTIVE MONTANA PHYSICIANS, 1988-1993



Based on assessments reported by the Montana Medical-Legal Panel

EXHIBIT 5
DATE 2/10/95
HB 309

JAMISON LAW FIRM
ATTORNEYS AT LAW
MONA JAMISON
STAN BRADSHAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: House Judiciary Committee

FROM: Mona Jamison, Lobbyist for "The Doctors' Company"

RE: Testimony on HB 309 -- $250,000 Cap on Noneconomic Damages

DATE: February 2, 1995

Section 1 of HB 309, however, limits awards for *noneconomic* loss. Noneconomic loss is defined in HB 309 as "pain, suffering,inconvenience, loss of consortium, physical impairment, disfigurement, and other non-pecuniary damages." No provision on HB 309 limits payments for *economic damages* such as lost wages and medical costs. These real damages are not affected by this bill.

Skilled attorneys can use the sympathy factor to manipulate juries into awarding high amounts for noneconomic damages. Placing a cap on such damages significantly reduces the cost of all claims, regardless of noneconomic factors. The cap allows malpractice insurance carriers to keep premiums down, which in turn allows physicians to continue delivering services. This is a benefit in rural areas and also for physicians practicing in high risk specialties, such as obstetrics.

The vast majority (over 95%) of medical malpractice cases are settled out of court and the damages typically are not categorized as economic or noneconomic. The lack of a cap on noneconomic damages leads to increases in the amount required to settle cases without a trial even though the actual settlement may not involve damages specifically categorized as an award for "pain and suffering."

A cap on noneconomic damages is singularly the most important element of stabilizing and reducing premiums for medical malpractice insurance for physicians.

-END-

JAMISON LAW FIRM
ATTORNEYS AT LAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

MONA JAMISON
STAN BRADSHAW

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: House Judiciary Committee

FROM: Mona Jamison, Lobbyist for "The Doctors' Company"

RE: Testimony on HB 309 -- Periodic Payments of Future Damages in Excess of $50,000

DATE: February 2, 1995

This provision allows settlements and judgments for "future" damages to be made in payments at regular intervals. Future damages are defined as payment for future medical treatment, care or custody, loss of earnings, or future noneconomic damages such as pain and suffering.

1. The injured patient receives more of an award under the periodic payment scheme proposed in Section 2 of HB 309. The attorney, however, receives less. Under a lump sum scheme, the plaintiff's attorney's fee is much higher because the fee is a percentage of a large amount instead of a percentage of a large amount reduced to its present value. This is also one aspect of the inherent conflict of interest presented by the contingency fee arrangement.

2. Periodic payments contribute to insurance premium stability. When the periodic payment of future damages is mandatory, as proposed in HB 309, it is easier for the insurer to calculate appropriate reserves. When an annuity can be bought within premium limits, reserves are calculable. Large lump sum losses that exceed premium limits wreak havoc with reserves and contribute to premium instability. In less populated states, substantial premium increases can result from even one large verdict or settlement that must be paid in a lump sum.

3. The tax consequences of periodic payments are much more favorable to the plaintiff. A lump sum payment itself is not taxable. However, when that sum is invested, the interested is taxable. Likewise, when payments are periodicized, each payment (which includes imputed interest) is not taxable. Where a portion of the payment is invested, the taxable income is taxed at a lower rate than income from a larger, lump sum.

4. When periodic payments are mandatory, settlement negotiations are more successful. When the plaintiff's attorney knows that future damages will be periodicized, he will be less likely to take the case to trial because it will not increase his chances receiving a higher fee--his fee will be lower than under a lump sum award. Overall, however, the patient receives the same amount of money (including imputed interest).

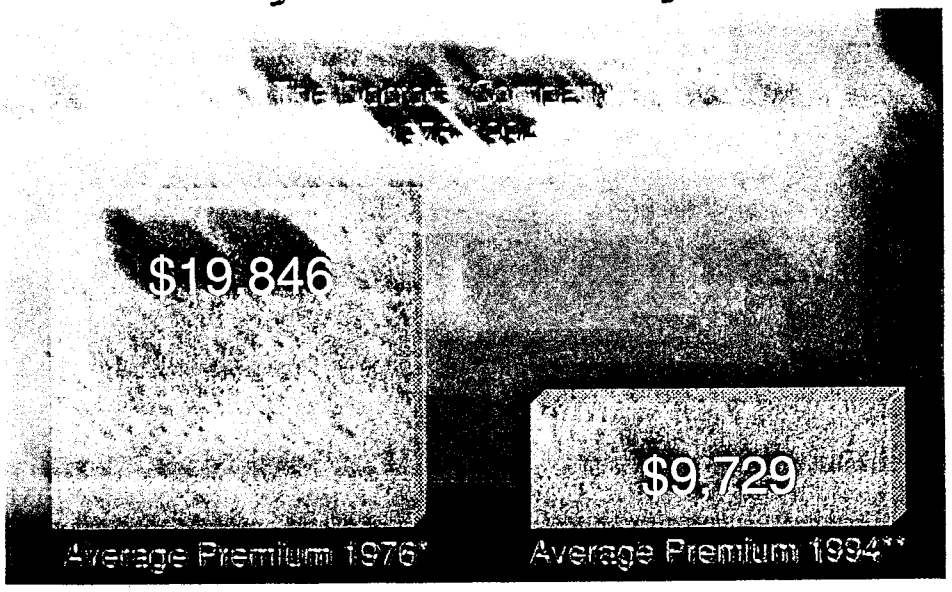
EXHIBIT 5
DATE 2-10-95
HB 309

5. Experience shows that when periodic payment provisions are discretionary, such as in existing law, judges, more often than not, will not exercise their discretion and order such payments. Thus, even though the mandatory periodic payment section is second in importance to the cap on non-economic damages on premium stability, only a mandatory provision will be effective.

6. Studies have shown that large lump sum payments are often depleted by the patient and/or the patient's conservator, often a family member. Since large lump sum payments are intended for future medical costs and lost wages, bad investments or extravagant expenditures use up the funds, which then become unavailable for their intended purpose.

-END-

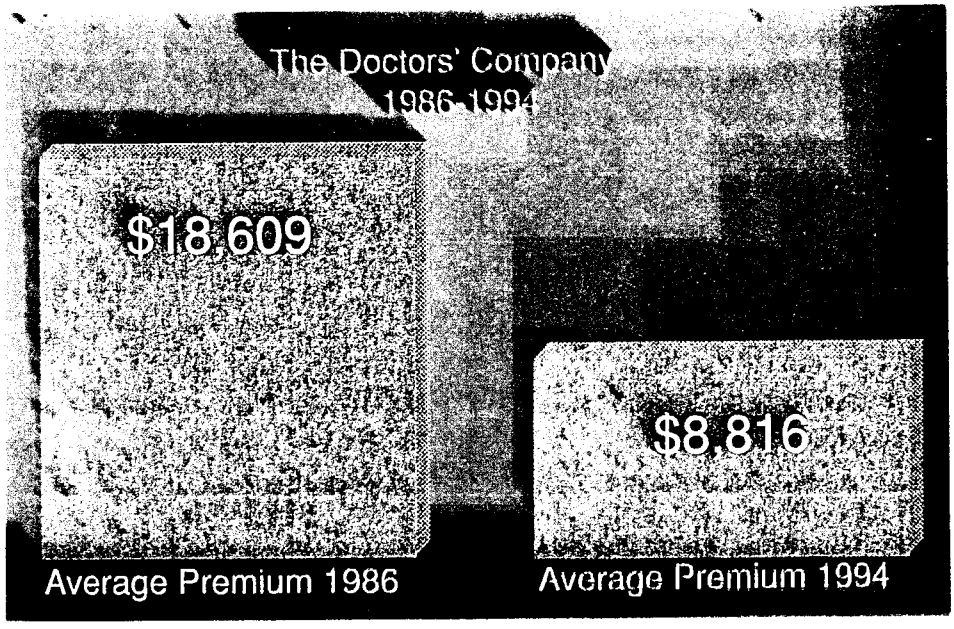
MICRA Reduces California Medical Liability Premium Rates by 51%



*$7,614 average premium adjusted to 1994 dollars on the December Urban CPI Index for a $1 Million / $3 Million Claims-Made Policy Premium

**After dividend deduction (where applicable) for a $1 Million / $3 Million Claims-Made Policy Premium

Tort Reform Reduces Colorado Medical Liability Premium Rates by 53%*

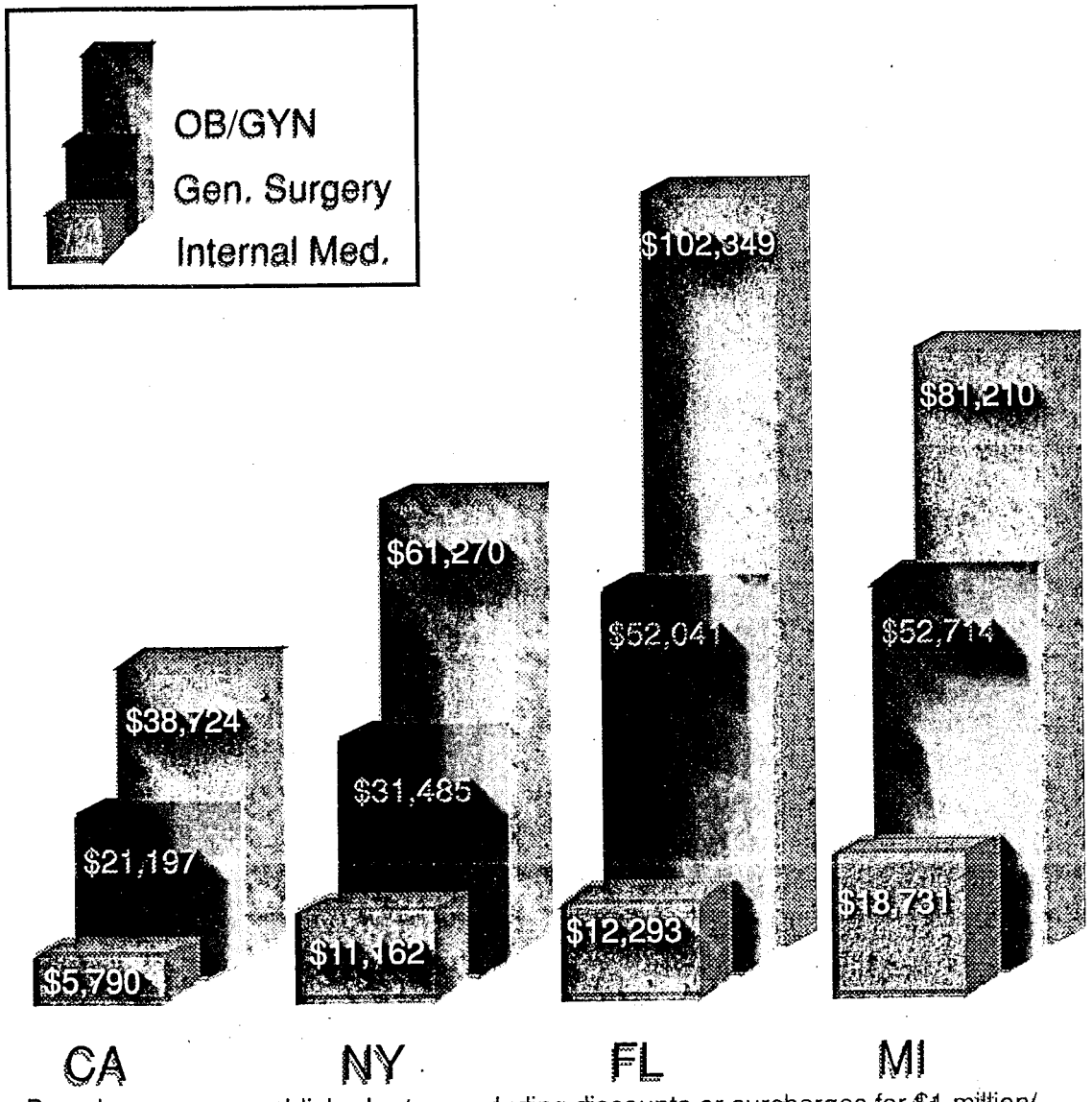


*The Doctors' Company's average of all specialties, including dividends for a $1 Million / $3 Million Claims-Made Policy Premium

EXHIBIT 5
DATE 2-10-95
HB 309

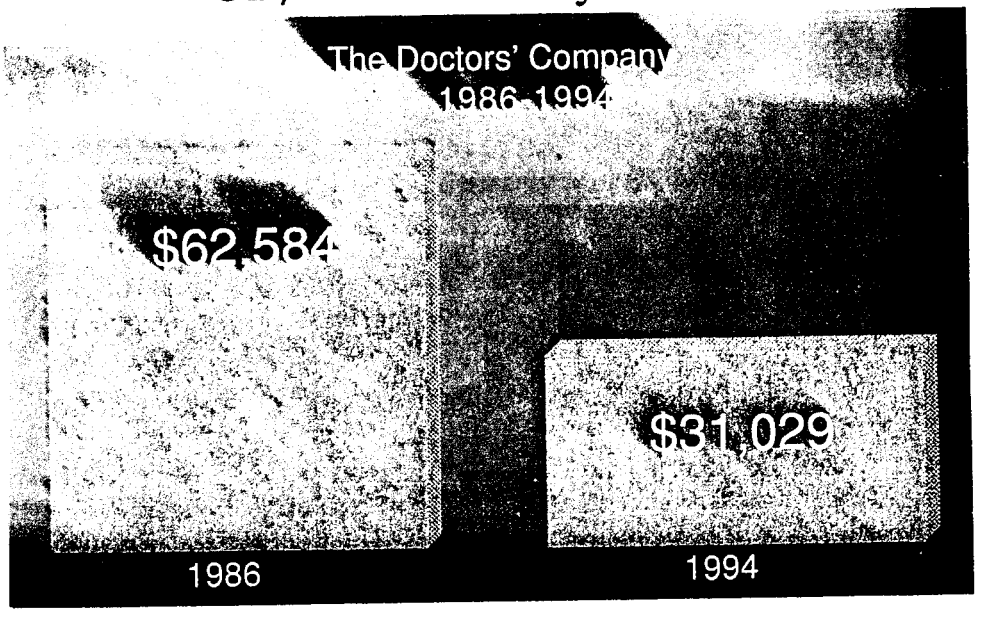
California Premiums Are Now Lower

Thanks to MICRA, liability insurance rates for California physicians are now one-third to one-half those paid by physicians in states that have failed to enact MICRA-like reforms, and that benefits all Californians.



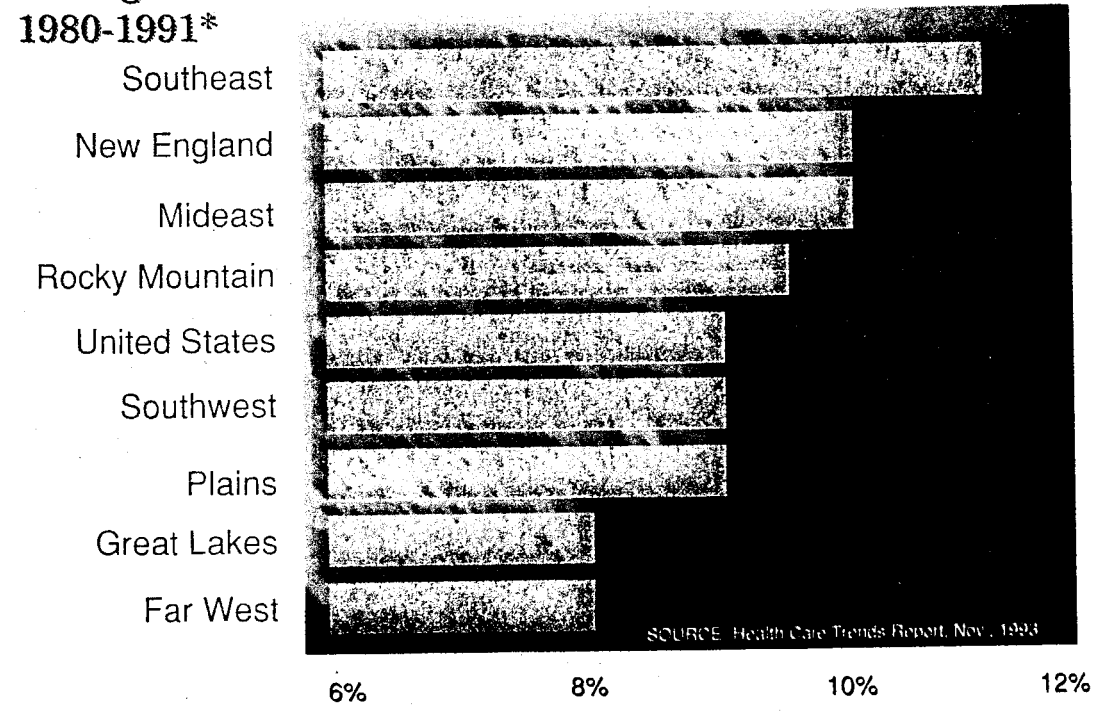
Based on average published rates excluding discounts or surcharges for $1 million/ $3 million in liabiltiy coverage.

Tort Reform Reduces Colorado OB/GYN Rates by 51%*



*The Doctors' Company's premiums, including dividends for a $1 Million / $3 Million Claims-Made Policy

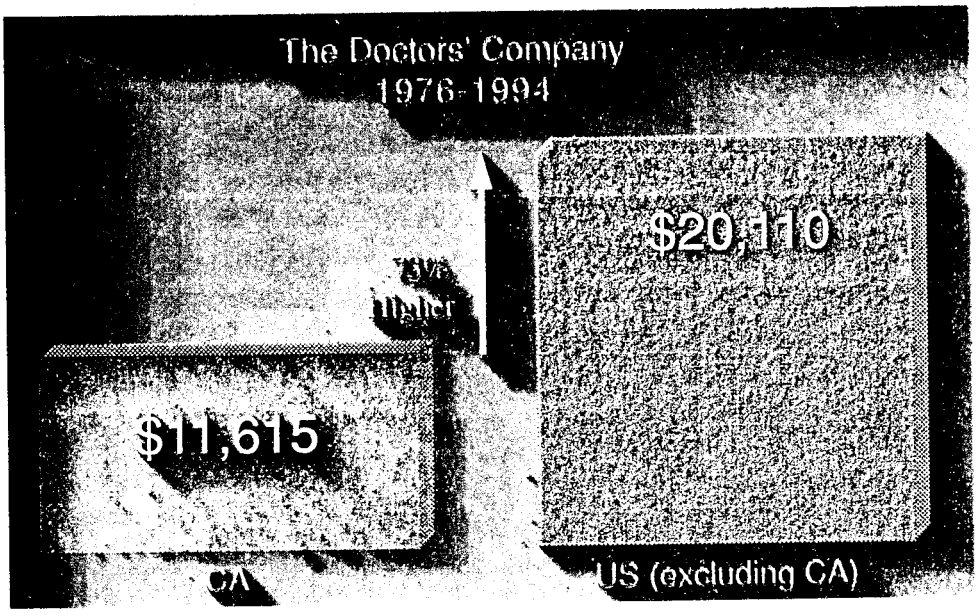
Average Annual Growth In Per Capita Spending 1980-1991*



*Includes per capita spending for hospital care, physician services, and prescription drugs

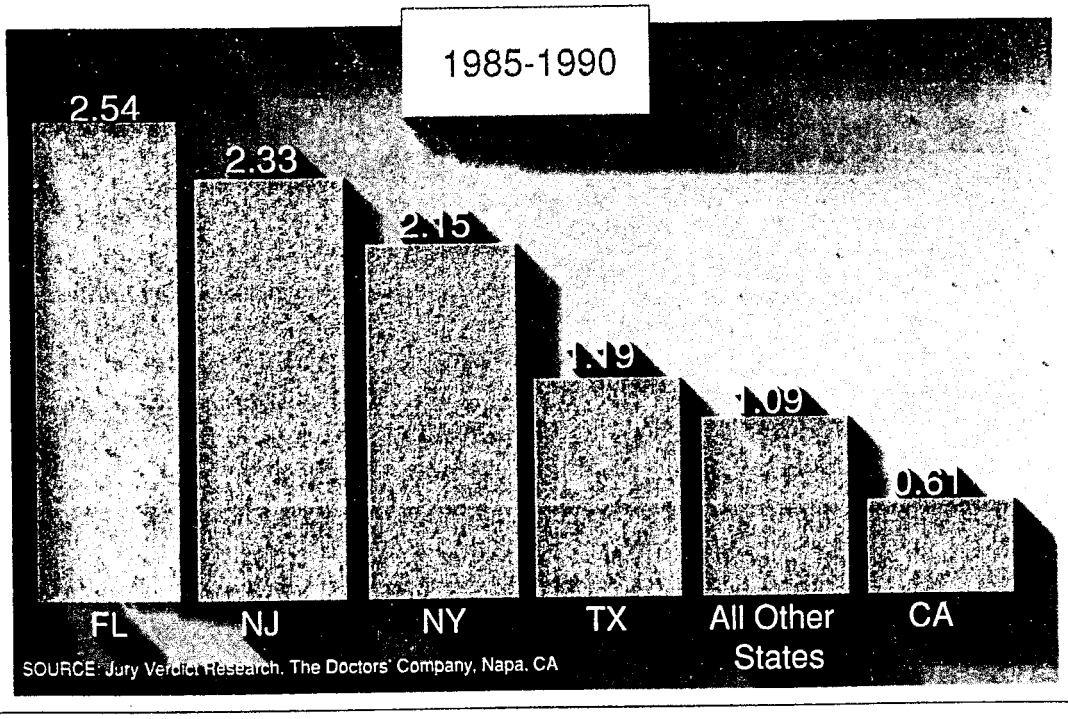
EXHIBIT 5
DATE 2-10-95
HB 309

Average of All Settlements & Jury Verdicts



MICRA Reduces Verdict Cost & Frequency

$1 Million + Verdicts Per 1,000 Doctors



SOURCE: Jury Verdict Research, The Doctors' Company, Napa, CA

EXHIBIT 6
DATE 2/10/95
HB 309

DIANNE M. NAGY, RNC, NP
OB / GYN Nurse Practitioner
in association with Daniel M. Molloy, M.D.

KM 312-1A (H) JUDICIARY
SEC JOANNE

I support House Bill 309 which limits non-economic damage to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Dianne M. Nagy RNC, NP
Dianne M. Nagy, RNC, NP

Dianne M. Nagy RNC, NP
Dianne M. Nagy, RNC, NP

MEMBER OF MONTANA ASSOCIATED PHYSICIANS, INC.
1239 N. Broadway • Billings, MT 59101 • (406) 245-4100

Jerome R. Stewart, D.O.

POLY DRIVE FAMILY PRACTICE

120 POLY DRIVE
BILLINGS, MONTANA 59101
TELEPHONE (406) 256-1135

EXHIBIT 7
DATE 2/10/95
HB 309

I support House Bill 309 which limits non-economic damage to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Jerome R. Stewart D.O.

Donald A. Grewell, D.O.
POLY DRIVE FAMILY PRACTICE

720 POLY DRIVE
BILLINGS, MONTANA 59101
TELEPHONE (406) 256-1135

EXHIBIT 8
DATE 2/10/95
HB 309

I support House Bill 308 which limits non-economic damage to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Donald A. Grewell D.O.

Diplomate American Board of Physical Medicine & Rehabilitation

Diplomate American Board of Electrodiagnostic Medicine

Donald H. See, M.D.

Physical Medicine & Rehabilitation
Electromyography
(406) 256-6227

Yellowstone Medical Building
Suite 201
1145 North 29th Street
Billings, MT 59101

EXHIBIT 9
DATE 2/10/95
HB 309

February 9, 1995

ATTENTION: MONTANA STATE LEGISLATURE

IN REGARD TO: House Bill 309

I SUPPORT HOUSE BILL 309 WHICH LIMITS NON-ECONOMIC DAMAGE TO $250,000 AND MANDATES PERIODIC PAYMENTS OF FUTURE DAMAGES IN MEDICAL MALPRACTICE CASES.

SINCERELY,

Donald H See

DONALD H. SEE, M.D.

Rocky Mountain Clinic

Rocky Mountain Service Corporation

EXHIBIT 10
DATE 2/10/95
HB 309

FAMILY PRACTICE
Bruce E. Knutsen, M.D.
Patrick J. McGree, M.D.
George Mulcaire Jones, M.D.
Obstetrics
Dennis Salisbury, M.D.
Obstetrics
Jennifer Krueger, P.A.-C.

INTERNAL MEDICINE
Ryland P. Byrd Jr., M.D.
Pulmonary Disease
John R. Jacobson, M.D.
Gastroenterology
Daniel H. Mathers, M.D.
Cardiology
J. Michael Sadaj, M.D.
Pulmonary Disease
Jake Taverna, M.D.
Arthritis and Related Diseases

February 08, 1995

Representative Bob Clark
Chairman, House Judiciary Committee
Montana State House of Representatives
Helena, MT 59601

FAX NUMBER: 900-225-1600

Dear Mr. Clark:

We wish to express vigorous support for House Bill 309, which would revise medical malpractice recovery laws.

We believe this bill will result in an overall decrease in health care costs to the people of Montana.

Sincerely,

J. Michael Sadaj, M.D.

Ryland P. Byrd, Jr., M.D.

Bruce E. Knutsen, M.D.

John R. Jacobson, M.D.

Patrick J. McGree, M.D.

Daniel H. Mathers, M.D.

George Mulcaire-Jones, M.D.

Jake Taverna, M.D.

Dennis Salisbury, M.D.

JMS:mkc
D/T: 02/08/95

EXHIBIT 11
DATE 2/10/95
HB 309

INTERNAL MEDICINE ASSOCIATES, P.C.
1230 N. 30th Street
Billings, Montana 59101

J. Patrick Byorth, M.D.
Neel Hammond, M.D.
Benjamin T. Marchello, M.D.
Neal Sorensen, M.D.
Michael Metzger, M.D.
Byron J. Busch, M.D.
David F. Johnson, M.D.
Gerardo Midence, M.D.

Internal Medicine
Oncology-Hematology
Endocrinology
Phone: (406) 238-690
1-800-648-627
FAX (406) 238-693

February 9, 1995

Dear Montana State Legislature:

I support House Bill 309, which limits non-economic damages to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Sincerely,

DAVID JOHNSON, M.D.

DJ/kls

D: 2/9/95
T: 2/9/95

MAPI

EXHIBIT 12
DATE 2/10/95
HB 309

INTERNAL MEDICINE ASSOCIATES, P.C.
1230 N. 30th Street
Billings, Montana 59101

J. Patrick Byorth, M.D.
Neel Hammond, M.D.
Benjamin T. Marchello, M.D.
Neal Sorensen, M.D.
Michael Metzger, M.D.
Byron J. Busch, M.D.
David F. Johnson, M.D.
Gerardo Midence, M.D.

Internal Medicin
Oncology-Hematolog
Endocrinolog
Phone: (406) 238-690
1-800-648-627
FAX (406) 238-693

February 9, 1995

Dear Montana State Legislature:

I support House Bill 309, which limits non-economic damages to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Sincerely,

NEAL B. SORENSEN, M.D.

NBS/kls

D: 2/9/95
T: 2/9/95

MAPI

EXHIBIT 13
DATE 2/10/95
HB 309

INTERNAL MEDICINE ASSOCIATES, P.C.
1230 N. 30th Street
Billings, Montana 59101

J. Patrick Byorth, M.D.
Neel Hammond, M.D.
Benjamin T. Marchello, M.D.
Neal Sorensen, M.D.
Michael Metzger, M.D.
Byron J. Butch, M.D.
David F. Johnson, M.D.
Gerardo Midence, M.D.

Internal Medicin
Oncology-Hematolog
Endocrinolog
Phone: (406) 238-690
1-800-648-627
FAX (406) 238-693

February 9, 1995

Dear Montana State Legislature:

I support House Bill 309, which limits non-economic damages to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Sincerely,

NEEL HAMMOND, M.D.

NH/kls

D: 2/9/95
T: 2/9/95

MAPI

EXHIBIT 14
DATE 2/10/95
HB 309

INTERNAL MEDICINE ASSOCIATES, P.C.
1230 N. 30th Street
Billings, Montana 59101

J. Patrick Byorth, M.D.
Neel Hammond, M.D.
Benjamin T. Marchello, M.D.
Neal Sorensen, M.D.
Michael Metzger, M.D.
Byron J. Busch, M.D.
David F. Johnson, M.D.
Gerardo Midence, M.D.

Internal Medicine
Oncology-Hematology
Endocrinology
Phone: (406) 238-690
1-800-648-627
FAX (406) 238-693

February 9, 1995

Dear Montana State Legislature:

I support House Bill 309, which limits non-economic damages to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Sincerely,

MICHAEL METZGER, M.D.

MM/kls

D: 2/9/95
T: 2/9/95

YELLOWSTONE NEUROSURGICAL ASSOCIATES, P.C.

EXHIBIT 15
DATE 2/10/95
HB 309

I support House Bill 309 which limits non-economic damage to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Thank you for your consideration.

Lisa Moring

FRED G. MCMURRY, M.D. JOHN I. MOSELEY, M.D.
1145 North 29th Street Suite 501 Billings, Montana 59101
FAX 406-259-5224 406-238-6650 1-800-648-6274
Members Montana Associated Physicians, Inc.

MAPI

YELLOWSTONE NEUROSURGICAL ASSOCIATES, P.C.

EXHIBIT 16
DATE 2/10/95
HB 309

I support House Bill 309 which limits non-economic damage to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Thank you for your consideration.

Gina Balazs

Gina Balazs

FRED G. MCMURRY, M.D. JOHN I. MOSELEY, M.D.
1145 North 29th Street Suite 501 Billings, Montana 59101
FAX 406-259-5224 406-238-6650 1-800-648-6274
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MAPI

YELLOWSTONE NEUROSURGICAL ASSOCIATES, P.C.

EXHIBIT 17
DATE 2/10/95
HB 309

I support House Bill 309 which limits non-economic damage to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Thank you for your consideration.

John I Moseley, M.D.

FRED G. MCMURRY, M.D. JOHN I. MOSELEY, M.D.
1145 North 29th Street Suite 501 Billings, Montana 59101
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Members Montana Associated Physicians, Inc.

MAPI

YELLOWSTONE NEUROSURGICAL ASSOCIATES, P.C.

EXHIBIT 18
DATE 2/10/95
HB 309

I support House Bill 309 which limits non-economic damage to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Thank you for your consideration.

Fred McMurry M.D.

Fred G. McMurry, M.D.

FRED G. MCMURRY, M.D. JOHN I. MOSELEY, M.D.
1145 North 29th Street Suite 501 Billings, Montana 59101
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MAPI

YELLOWSTONE NEUROSURGICAL ASSOCIATES, P.C.

EXHIBIT 19
DATE 2/10/95
HB 309

I support House Bill 309 which limits non-economic damage to $250,000 and mandates periodic payments of future damages in medical malpractice cases.

Thank you for your consideration.

Judy Schopfer

Judy Schopfer, RN

FRED G. MCMURRY, M.D. JOHN I. MOSELEY, M.D.
1145 North 29th Street Suite 501 Billings, Montana 59101
FAX 406-259-5224 406-238-6650 1-800-648-6274
Member Montana Associated Physicians, Inc.

MAPI

EXHIBIT 20
DATE 2/10/95
HB 309

JANET L. DIETRICH, M.D.
Gynecologist

North Broadway Medical Center
1239 North Broadway, Suite 5
Billings, Montana 59101
406 245-4100

2-9-95

I support House Bill 309 which limits non-economic damages to $250,000 and mandates periodic payments of future damages in medical malpractive cases.

Janet L. Dietrich M.D
Janet L. Dietrich, MD

Janet L. Dietrich M.D
Janet L. Dietrich, MD

EXHIBIT 21
DATE 2/10/95
HB 309

SURGICAL ASSOCIATES, P.C.
GENERAL, VASCULAR AND THORACIC SURGERY
MEDICAL ARTS CENTER • 1230 NORTH 30TH STREET
BILLINGS, MONTANA 59101-0178
(406) 252-8494

ELMER E. KOBOLD, M.D., F.A.C.S.
JOHN H. COOK, M.D., F.A.C.S.
JOHN D. MIDDLETON, M.D., F.A.C.S.
DENNIS W. MAIER, M.D.

MEMBER OF
MONTANA
ASSOCIATED
PHYSICIANS, INC.
FAX: (406) 657-8837

RM 312-1A
SEC JOANNE

February 8, 1995

To the House Judiciary Committee:

Please support House Bill 309. A cap on non-economic damages and mandating periodic payments in medical liability cases is long overdue in Montana. These tort reform measures will lower insurance costs and will add predictability to malpractice premiums.

These tort reform measures add fairness and reasonableness to medical liability cases when an unintended injury by an honest caring physician occurs. They do not lower actual damages to an injured patient.

Please support HB 309.

Sincerely,

E. E. Kobold, M. D.

EER/dle

EXHIBIT 22
DATE 2/10/95
HB 309

Billings West
Internal Medicine

February 8, 1995

House Judiciary Committee
Capitol Building
Helena, MT 59603

Dear Sirs:

I'm informed that you are considering a Tort reform bill.

Please support H.B. 309 which will decrease liability insurance costs by mandating periodic payments and placing a cap on non-economic damage.

Sincerely,

Joseph C Maheras MD

Joseph C. Maheras, M.D.

David K. Drill, M.D. • Leonard W. Etchart, M.D. • Joseph C. Maheras, M.D. • Michael C. Hagan, M.D.
1650 Avenue D • Billings, Montana 59102 • 406/248-1136

EXHIBIT 23
DATE 2/10/95
HB 309

The American College of Obstetricians and Gynecologists
DISTRICT VIII

Office of the Chairman
Montana Section
Van Kirke Nelson, M.D.
210 Sunnyview Lane
Kalispell, MT 59901-3190
(406) 752-5260

February 8, 1995

Representative Bill Boharski
House Judiciary Committee
Capitol Station
Helena, MT

Dear Representative Boharski:

I write this letter on behalf of the physicians in Montana who practice obstetrics and gynecology.

We all very much appreciate the introduction of House Bill #309 and those that have supported it to date.

Many of us consider this as the "capstone" of any successful legislation as it applies to tort reform and stabilization of premiums.

I know that each of you on the Judiciary Committee have heard testimony and are familiar with the arguments, both pro and con.

Very clearly, we still have areas in Montana, most of them rural, that would have physicians practicing obstetrics if their obstetrical premiums were affordable. Retention of physicians is still a problem because it is difficult to make a living in a rural committee and affordable premiums would make a difference.

This year we have already been advised by our carrier that there will be a 6-8% increase. When you have to pay in excess of $20,000 for your liability premium--it does make a difference.

Passage of House Bill #309 will stabilize the cost of liability insurance in Montana and many of us do believe that with stabilized premiums and insurance at a reasonable cost that we can attract physicians to rural areas and retain them.

I believe that every responsible physician believes in the importance of liability insurance because we do make mistakes and the patient should be compensated but not enriched as the present climate allows.

Further, most Montana physicians appreciate the high cost of health insurance and are trying to hold the line as far as increased costs for physician services rendered to patients. Certainly passage of House Bill #309 will assist in that endeavor.

Thank you very much for your service to Montana in this busy legislative season. Many of us do appreciate it.

Thank you.

Cordially,

Van Kirke Nelson

Van Kirke Nelson, M.D.

VKN/ce

BILLINGS GASTROINTESTINAL ASSOCIATES

THOMAS W. KORB, M.D.
NINA TOMASZEWSKI, M.D.
STEPHEN E. BAUM, M.D.

8 Feb 95

EXHIBIT 24
DATE 2/10/95
HB 309

To: House Judiciary Committee

Gentlemen:

Please support House bill 309 imposing a cap of $250,000 on non-economic damages and mandating periodic payment of future damages. A similar bill appears to be working in California in decreasing malpractice insurance rates and ensuring predictability of premiums.

I believe these measures will add fairness and a more reasonable approach in medical liability situations in which unintended injury occurs to a patient and will not lower payment of actual damages to a patient

Sincerely

Stephen E Baum MD

YELLOWSTONE MEDICAL BUILDING · 1145 NORTH 29TH STREET · SUITE 105 · BILLINGS, MT 59101-0139
406-245-8759 · 800-648-6274 (MAPI) · 800-252-1246

MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on March 21, 1995, at 9:00 a.m.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 309
Executive Action: None

HEARING ON HB 309

Opening Statement by Sponsor:

REPRESENTATIVE DUANE GRIMES, House District 39, Clancy, presented HB 309. Two years ago they had a tort reform bill before the legislature which was much larger and contained objectional elements. This bill contains the key elements to assist with medical malpractice tort reform in Montana. This bill accomplishes two objectives. First, it sets a cap on non-economic damages, which would be other than lost wages, medical expenses, and ongoing complications because of a malpractice issue. These awards can be in the tens of millions. This would

include pain and suffering. Because of the open ended liability on non-economic damages, insurance rates for doctors in this state are exorbitant. This bill will stabilize the insurance liability, lower the doctors rates and indirectly have benefits for every citizen in this state. The second part of this bill deals with periodic payments. This is necessary to stabilize the insurance environment for medical malpractice insurers. This would take any award given, both economic as well as non-economic, and make payments periodically. An annuity is bought and the present value award of the settlement is paid to the injured party. Those periodic payments can be adjusted in any way the court and the parties in the suit see fit. He referred to a large award in California amounting to $40 million. The entire settlement was satisfied through an annuity of approximately $7 million. The reason is that from the present value standpoint, the interest which accrued, paid off the entire $40 million settlement. That periodic payment was structured around the time that the actual needs would occur in the life of the person who won the award. This takes away the lottery type of award and puts the award back to an actual settlement for the damage which was done. This bill is good for patients in that it gives them more of the settlement. The trial lawyers who represent the suing party are paid out of the first part of the annuity. In the case of the settlement in California, if the first payment was $10 million, all the legal costs would have been paid as a percentage out of the first $10 million rather than out of the total $40 million. This bill is good for the providers and the state's medical access problem. It will help stem the rising doctors rates in this state which are exorbitant and driving doctors to seek other population centers where they can more easily cover their skyrocketing medical malpractice insurance.

Proponents' Testimony:

Laurie Ekanger, Governor's Office, stated the Governor recommends HB 309 and urges the committee's support. This bill represents an important piece of health care reform and will contribute to making health care more accessible and affordable to Montanans. Experience in other states that have enacted these kinds of reforms, such as Utah and California, indicate that these reforms do bring some stability and predictability to a major cost of medical business in Montana which is liability insurance. This can result in lower premium rates, which can be passed on to consumers in terms of cost savings, or increased accessibility to services. The premium for a family practitioner who practices obstetrics is about three times the premium of a family practitioner who does not practice obstetrics.

Jerome Loendorf, Montana Medical Association, stated that HB 309 contains two parts. The first is a limit on non-economic damages in the amount of $250,000; second, there is a requirement, if requested by a party, that future damages be paid in periodic payments. Non-economic damages include pain and suffering,

humiliation, emotional distress, and other non-monetary losses. This would not include loss of wages, medical expenses, loss of domestic services, and other monetary losses. More than half the states have placed limits on damages including non-economic damages. Limits on damages are not new in this state. The Montana Legislature has limited damages in suits against the state per claimant to $750,000 and per occurrence to $1.5 million. This would include economic as well as non-economic damages. If a person had $500,000 for lost wages, $500,000 for medical expenses and $500,000 for pain and suffering which resulted in an incident in a state hospital, the recovery would be limited to $750,000 which would be half of the amount which was awarded. If the same incident occurred in a private hospital, under this bill the recovery would be $1,250,000, the reduction being only that portion of the damages that were non-economic. The loss of wages and medical expenses would not be reduced. Montana imposes a greater limit on a recovery than this bill would propose in private actions. Since 1915, Montana has limited recoveries in workers' compensation cases. Currently, no non-economic damages can be recovered and even economic damages are limited. It limits recovery in wrongful discharge cases. The purpose of this bill is to provide stability in the liability insurance marketplace to make predictability for underwriters. When trying to negotiate a settlement, it is easy to get a handle on what lost compensation might be. Health care expenses have dollar amounts attributed to them. Non-economic damages are difficult to measure. That is why states are putting limits on non-economic damages. The second part of the bill would require periodic payment of future damages when the amount of those future damages exceeds $50,000. This would leave a lot of discretion to the judge to adjust the payments. It's important to the claimant because he will have known amounts of given income. These payments are adjusted for inflation. The judge can make adjustments for a child who may want to go to college or provide for future large medical expenses. The claimant can be assured the money will be there when needed. These payments would not be taxed. The principal amount and the projected interest which are components of the periodic payment are not subject to tax. If a person receives the award in a lump sum which would then be reduced to present value, that person would have to invest the money and the interest would be subject to tax. The person receiving an award by periodic payments should receive more money than they receive under a lump sum. There is also an advantage to the insurance carrier. The insurance carrier can purchase the annuity for less money than it would take to pay the lump sum. Annuities are cheaper to buy because of the differential in interest rates. He submitted his written testimony, **EXHIBIT 1.**

Mona Jamison, The Doctors' Company, stated The Doctors' Company is the primary insurer for medical malpractice in the state of Montana. They insure approximately 700 physicians. If this bill passes with a cap of $250,000 on non-economic damages and periodic payments for awards over $50,000, their rates will go

down in the range of five to seven years. HB 309 is about access of Montana citizens to physicians. By capping non-economic damages at $250,000, the area of volatility and unpredictability in the premium setting process is reduced. There are very few cases which have non-economic damage awards or settlements over $250,000. They are approximately 2% of the cases. The cap is important because of the unpredictability of the 2% of the cases. When California enacted the $250,000 cap and periodic payments, the rates went down substantially. Caps are not new to Montana. In workers' compensation cases there is a limitation on attorneys fees. By capping non-economic damages, the chance of settlement is increased and the overall cost of litigation is decreased. In litigation, the experts on both sides can come to agreement on what the economic losses are as to lost wages, future wages and medical costs. What they cannot agree on is the non-economic benefits. The loss due to pain and suffering is subjective. The plaintiff with a more effective attorney will secure a higher settlement for pain and suffering than another attorney can, where the pain and suffering was greater. Once non-economic damages are capped, the incentive to continue the case to trial or hold out for settlement, is removed. The lottery aspect of the damages has been limited. Other states have caps on both economic and non-economic damages. Indiana caps economic and non-economic damages at $750,000. The U.S. House of Representative has passed legislation capping non-economic damages at $250,000. The injured patient benefits from periodic payments by collecting more money. An existing statute clarifies the payment of attorneys fees, § 25-9-404, MCA. This statute states that when the plaintiff receives periodic payments, the fees incurred to recover future damages to be paid by periodic payments must be calculated on the basis of the present value of the future damages. If there is a $5 million settlement, there is always a lump sum payment which covers the medical bills and lost wages incurred and enough to compensate the attorney. If $1 million is paid up front, an annuity of $4 million would be needed. The plaintiff, over 20 years, will collect $4 million plus the imputed interest which is allocated in each payment. The attorneys fee, under Montana law, is 1/3 or 40 to 50% of that annuity reduced to its present value. If the annuity was $1 million for $4 million, it would be 40% of $1 million plus 40% of the original lump sum. This compares to 40% of $5 million. The plaintiffs recover more with periodic payments in terms of future dollars. The other beneficiary is the insurance company. It is easier to buy an annuity for $1 million than to pay out $4 or $5 million. The tax consequences are also significant. If the plaintiff recovers a lump sum, all investment earnings and interest are taxed. As the interest is imputed to these periodic payments is received by the plaintiff, they are not taxed. **Ms. Jamison** presented her written testimony, **EXHIBIT 2.**

Bill Olsen, American Association of Retired Persons, stated their support of HB 309.

Nancy Clark presented her written testimony is support of HB 309, **EXHIBIT 3.**

Jacqueline Lenmark, American Insurance Association, spoke in support of HB 309. The cost of malpractice insurance has been a significant problem in Montana and nationally since the early 1970s. Insurance rates in Montana are regulated by the Insurance Commissioner who has the ability to disapprove malpractice insurance premium rates whenever they are excessive, inadequate, or unfairly discriminatory. Insurance companies use a loss ratio to indicate profitability. When their loss ratio is at 100%, they are breaking even. When it falls below 100%, they are making some money. Medical malpractice loss ratios over the past four years have remained over 100%.

Arlette Randash, Eagle Forum, presented her written testimony in support of HB 309, **EXHIBIT 4.**

Laurie Koutnik, Christian Coalition of Montana, presented her written testimony in support of HB 309, **EXHIBIT 5.**

Jim Tutweiler, Montana Liability Coalition, stated their support of HB 309.

Jim Ahrens, Montana Hospital Association, stated their support of HB 309.

John Hanson spoke in support of HB 309. He is a physician from Billings. He does not know of a single physician who would knowingly or willingly harm his or her patient. When a patient is injured, the physician feels devastated, even more so if it might have been prevented. The doctor would like to make his or her patient whole. The main reason doctors carry liability insurance is to take care of those patients in a fair and reasonable manner. Unlimited awards for non-economic damages are unfair and, at times, unreasonable. They are not asking for limitation of losses of income, payments for future medical expense, etc.; however, they are asking the committee to define the upper limits of an area that may be almost undefinable but certainly as tragic and highly emotional. This legislation benefits the vast majority of Montana citizens because it caps liability insurance premiums and should increase services.

{Tape: 1; Side: B}

Opponents' Testimony:

Gene Jarussi, Montana Trial Lawyers Association, stated that a claim for medical malpractice arises when a patient fails to receive proper medical treatment and is injured by it. This bill is designed to limit the injured patient's recovery for medical malpractice claims. The theory behind this bill seems to be that

by limiting the recovery of Montana citizens, the insurance rates charged to doctors by their insurance companies, will go down. The bill does not ensure that any drop is passed on in the form of savings to the patients. Rates are based on what is paid out on claims. Who is responsible for the claims? The records from the Board of Medical Examiners shows that 8% of the physicians in Montana are responsible for 58% of the claims and more than 60% of the dollars paid on claims. Ninety two percent are good doctors who have little or no exposure to the system. The 8% are the ones who are burdening the system. These problem physicians pay the same premiums as the good physicians. The average claim payments for good doctors would be approximately $14,000. The claims paid for the repeater physicians are more than a quarter of a million dollars. Who are the repeater doctors? We do not have any knowledge of their identity. In the mid 1980s The Doctors Company insured a neurosurgeon named Albert Joern from Kalispell. In the early 1990s he declared bankruptcy and the claims which had been brought against him were made public. He presented **EXHIBIT 6,** a letter from The Doctors Company to Albert Joern's bankruptcy attorney listing the 16 claims which arose in a five year period. His income was $197,000 a year. The legislation which should be before this committee is legislation designed to correct the problem of the problem doctors. Over 90% of the doctors in Montana have little or no contact with medical malpractice claims. The public of this state should be protected from repeater doctors, not protect repeater doctors from the public. Additional handout from MTLA, **EXHIBIT 7.**

Tony Reis stated he hurt his back in 1983. It caused him pain, but he lived with him. In January of 1987, Dr. Joern performed two surgeries on him for a bulging disc. Neither surgery was successful. The neurosurgeons who have treated him since that time have said that the care provided by Dr. Joern violated the applicable standard of care and was negligent. He is worse off today than he was when he met Dr. Joern. The surgeries performed by Dr. Joern were not appropriate for his problems. His medical expenses to date are more than $130,000. He will never be able to work again. He will always have to be on pain medication. He has been told there is nothing medicine can do to repair the damage which has been done. He believes that any limit on damages in cases like his, is totally inappropriate.

Roxanne Kegel Rowe spoke in opposition to HB 309. Her brother died from complications after having his wisdom teeth removed. She is a school counselor and does her job as well as she can. She expects the medical profession to do that too. The doctor in the emergency room told her family that her brother's death was a mystery. The coroner's office said it must have been arrhythmia. The dental board found no wrongdoing with the oral surgeon. They found out that the oral surgeon chose to have antiquated equipment in his office. Why was this person insured and who insured him? She is glad they had a chance to sue. How does anyone make up for a death?

Marge Asken commented that for 20 years she had the same physician. He did not inform her about the possibility of surgery for the cancer she had. He wanted her to have radiation. If she had gone ahead with radiation, she would not be alive today. Because of her settlement, her doctor now refers patients to a specialist when he is not able to handle the case.

Joey Heddick stated she went in for a hysterectomy in 1984. The surgery seemed to have gone well; however, there were complications later that evening caused by an error her physician had made. She had three relapses during the next three months. She could not work. She had a hard time finding an attorney to take her case. They spent approximately $12,000 of their own money on her case. The victims of malpractice already have lifetime sentences to live with damages caused by doctors. Doctors need to be responsible for their actions. The only way to deal with these physicians is by money. Putting a cap on damages is to protect a very select group of people. She does not believe that doctors and insurance companies need to be protected that way. Insurance companies should be more selective about which doctors they insure.

Patrice Downey commented she had been an insurance broker in the past. When passing tort reform legislation, we need to ask what the effect will be of setting a limit of $250,000 for recovery of non-economic damages which includes physical impairment and disfigurement and pain and suffering. In the field of obstetrics and gynecology, there is one specialist who takes on a greater risk, is not in the business of providing long term care. This is the abortionist. We have 20 years of data compiled mostly by the abortion industry which indicates that there are complications associated with safe and legal abortions. These complications include mild depression, pelvic inflammatory disease, breast cancer and death. The most common serious condition to occur from an induced abortion is post abortal pelvic inflammatory disease. There are 1.6 million abortions performed annually in the United States. If 10% of these women contact pelvic inflammatory disease, 160,000 women receive permanent damage by health care providers who are not required by law to inform their patients of the risks associated with the surgery they are about to undergo. She posed the scenario of a young women of 21 years of age undergoing a safe and legal abortion and then contacts PID and as a result of that, will be sterile at the age of 23. HB 309 states her only recourse would be for physical impairment or pain and suffering. If she were able to find an attorney to represent her, he would require 40 to 50% to take her case. Her case would also require expert witnesses and court costs. The young woman may be able to receive $100,000. As an insurance broker, she specialized in errors and omission insurance. The insurance industry knows how to underwrite. They know how to differentiate whether or not a doctor is performing more dangerous procedures, informing his patients, and how many claims have been presented against him. The insurance industry knows how to differentiate a good driver

from a bad driver, a crane operator from a contractor, and also a good doctor from one is knowingly taking on risks every day of his practice.

Bob Jones stated that while in surgery he was given a blood transfusion and the blood given to him was full of the AIDS virus. One improperly tested and screened unit infected four patients. The other three died from their surgeries.. The Red Cross accepted no responsibility. The victim has no protection. By putting caps on the victim, he is limited in obtaining a lawyer who will handle his case. A good attorney knows the cost of investigation, expert witness and other costs can exceed any recovery. He has had 20 to 40 years cut off of his life. Who can put a price on that?

John Schulte stated he was appearing on behalf of Felicia McLean. He is her guardian ad litem and conservator. Felicia received a judgment against Community Medical Center in the amount of approximately $3 million. When born, she was not given oxygen and as a result she is a spastic quadriplegic and has cerebral palsy. She will be confined to a wheelchair with no motion. She cannot talk. She has received a large award but her health care costs will continue throughout her life. The jury is the best check there is on runaway awards. Felicia's mother had a claim for $250,000 from the jury, she was not awarded any money. The jury gave Felicia what they thought would take care of her for the rest of her life. When there are damages at birth, the damage costs will be astronomical.

Mark O'Keefe, Commissioner of Insurance, stated they worked with the Joint Interim Committee for the last two years on tort reform. The Committee decided if it ain't broke, don't fix it. The Montana Health Care Authority decided that 31 cents out of a hundred dollars savings in terms of the total potential for tort reform was not enough to address the issue. He requested an amendment which would provide that all medical malpractice insurance carriers be required to file proof that the legislation actually reduces rates. Their numbers show that nationally there is a 29% profit margin in medical malpractice. Workers' compensation and auto insurance have a 5% profit margin. Perhaps there should be a cap for medical malpractice profit at 10% to 20%. That would greatly reduce rates.

Randy Bishop presented the written testimony of Jill Blunt whose husband died as a result of a failure to diagnose a highly treatable form of bone cancer, **EXHIBIT 8.**

Additional handouts, **EXHIBITS 9 THROUGH 14.**

Informational Testimony:

Questions From Committee Members and Responses:

SENATOR HOLDEN, referring to page 1, line 21, asked for clarification of the language in (i).

Ms. Jamison stated that the $250,000 cap on non-economic damages would be per incident, not per claimant. The cap is imposed on a per incident basis.

SENATOR HOLDEN asked if one or more people were involved in the same incident, would the one cap apply to all the people involved?

Ms. Jamison stated this only prevents family members to also sue over the same claim and each get a separate judgment for non-economic damages.

SENATOR NELSON asked what the average lump sum settlement would be in Montana?

Ms. Jamison stated in 1994 premiums earned were $7.4 million, settlements and judgments were $5.2 million, defense costs were $1.4 million and other costs exceeded $750,000.

SENATOR NELSON asked what would become of the periodic payment if the injured party died?

Ms. Jamison stated the bill makes it clear that the estate would receive the remaining payments left on the annuity.

SENATOR NELSON asked if the injured child is compensated for the future job that that child might have had.

Ms. Jamison stated a "bad" baby case had settled for $53 million which included economic damages for lost wages, future medical costs and pain and suffering. They look at the family history to project what the likely future of that child would be.

SENATOR DOHERTY asked what would happen if there was a problem with the annuity. How would the injured party receive full satisfaction of the judgment?

Ms. Jamison answered that the House amendments raised the rating to an A+ rating. The Doctors' Company purchases an assignment of interest at the time that the annuity and the settlement is structured. That would be insurance on the first insurance. The Doctors' Company pays approximately $500 for this assignment. The reason it is so inexpensive is because there is rarely a problem.

{Tape: 2; Side: A}

SENATOR DOHERTY questioned the periodic payments of $100,000 in Section 3 and $50,000 in Section 2.

Ms. Jamison stated that one of the things which killed the bill in the last legislative session was the over inclusive, over encompassing nature of addressing every tort imaginable. The focus of this bill is medical malpractice. The intent of this bill was to address the premium rate for physicians. The intent was not to change the entire tort reform area. Section 3 stands alone except for medical malpractice tort cases.

SENATOR DOHERTY asked about an amendment to the bill which Commissioner O'Keefe mentioned earlier of capping the profit margin of medical malpractice carriers in Montana or requiring proof that rates were reduced.

Ms. Jamison stated she did not find any inherent evil or negative in an insurance company making a profit. Last year the loss ratio for The Doctors' Company in the state of Montana was 102%. You have to be below 100% to make a profit. Why should an insurance company be required to prove rates were reduced when no other proponent on any other bill has to show proof?

SENATOR DOHERTY asked why this legislature should treat doctors better than they treat anyone else in the state?

Ms. Jamison stated she did not feel that was the case. The legislature addresses the needs of various citizen groups and business groups which would include physicians and insurance companies.

SENATOR HALLIGAN stated the injured party would not actually be getting $250,000 because that would be reduced by the court. What are the usual reductions that a court would make?

Mr. Loendorf stated the reductions appear on page 2 and refer to statute numbers. The first refers to comparative negligence, the second is a reference to joint and several liability and the third refers to a situation wherein the defendant already had a judgment against the plaintiff that could be offset.

SENATOR HALLIGAN asked whether the House discussed making a real cap with no reductions?

Mr. Loendorf answered that comparative negligence, joint and several liability and judgments ought to be treated the same in these cases as all others.

SENATOR HALLIGAN asked **Mr. Hill** his opinion of the wording on page 1, line 21, in regard to the incident mentioned earlier wherein there may be three people injured by the same incident.

Mr. Hill commented the most common scenario is in a hospital setting where an error would injure several people. He further

commented about an incident in Billings wherein a computer error caused eight patients to receive overdoses of radiation. If the same act of malpractice contaminated four different people, under the bill that would be a single incident.

SENATOR BISHOP commented that if insurance rates are well regulated so as not to be excessive or inadequate, why do we need this bill?

Ms. Lenmark stated she meant that in the context of talking about excessive insurance company profits and correlating premium with pure loss information. Insurance rates reflect the cost of the risks which are being insured. The rates are high because the risks which are being insured, the amount which is being paid out under the policy, is high. The effect of this bill will be one factor in reducing the cost of the risk which is being insured. Once the cost of the risk is reduced, the premiums can come down.

SENATOR ESTRADA asked **Ms. Jamison** to clarify the possibility of the cap applying to all persons in one incident.

Ms. Jamison stated that if different individuals receive separate damages, they each have their own cause of action.

SENATOR BARTLETT asked **Ms. Jamison** how a premium for an individual doctor was set? What are the factors taken into account which would set a specific rate?

Ms. Jamison stated that the experience for Montana physicians is what is used in setting the rates. The actual rate making process is very complicated. One of the factors which is also looked at is the legislation that exists in a particular state. Caps and periodic payment legislation would be factored into the rate making process and cause stabilization of the rates.

SENATOR BARTLETT stated that according to previous testimony about 8% of the doctors in the state of Montana are responsible for the majority of the malpractice claims which are made. If she were one of the eight percent, how would her rate differ from anyone else who is not part of that eighth percent but works in the same field of medicine.

Ms. Jamison stated that the process The Doctors' Company uses for repeat physicians is to place a surcharge on their premium.

SENATOR BARTLETT stated that the Judiciary Committee hears many criminal justice bills and in many instances penalties for violating a law are graduated. The second time costs more money or there is a longer prison sentence. She is not suggesting that malpractice is a crime, but she would like to take that concept of increasing penalties for repeat offenses and apply it to the caps. What would The Doctors' Company response be if they looked at graduating the level of awards which could be made if the

provider is found guilty of malpractice for a second or subsequent time?

Ms. Jamison stated they would oppose that. The benefit of the caps is statewide per the different specialties. She would suggest looking toward the Board of Medical Examiners. They have the direct one on one enforcement against the repeat offenders. **SENATOR BARTLETT's** proposal would penalize the statewide physicians in terms of their premium rates in compensating for these adjustments.

SENATOR BARTLETT asked **Mr. Loendorf** if the Montana Medical Association has any consistent programs for the physicians who are members that focuses on reducing medical error?

Mr. Loendorf answered that there are a number of sources which provide that type of training. The insurers encourage it. There are programs through their own association and also their specialty associations. There are conferences held throughout the country. The Medical Association proposed the bills which enacted the laws which required reporting of any physicians who were not safely engaging in the practice. The board meets bimonthly to deal with physicians who have had claims of unprofessional conduct filed against them.

SENATOR DOHERTY stated that since malpractice premiums are a cost of doing business, is there any guarantee that that will be passed on to consumers or will that money be pocketed by the individual whose bottom line has improved? Given that there have been reductions in California and Colorado, how much did the costs for the medical consumer go down?

Mr. Loendorf stated that as a pure business proposition, assuming the physician has a designated amount of income he wants to make in a given year, after all expenses are deducted the total amount should go down.

Ms. Jamison stated there has been a lot of debate as to what extent does tort reform affect the fee for services actually charge by the physicians. The main part of tort reform is access. The second benefit is a reduction in fee for services. The marketplace will drive the prices down.

SENATOR BAER stated that they are only dealing with the law of negligence in medical malpractice cases. This bill would not affect any award of punitive or exemplary damages. In the example of a hospital employee working in the operating room who negligently operates an autoclave and instruments then become contaminated and are used on three different people. If these people develop infections and make claims, each injured person would have a separate action against the hospital.

SENATOR HALLIGAN asked **Ms. Jamison** if she could get a letter from The Doctors' Company indicating that they do base their premiums on Montana claims experience.

Ms. Jamison agreed to provide the letter.

CHAIRMAN CRIPPEN stated that 92% of the physicians in Montana have very few claims and 8% are the repeaters. He asked if all doctors were given a flat rate and then the 8% pay a surcharge on top of that premium.

Ms. Lenmark stated the rate filed with the Insurance Commissioner reflects the exposure of the specialty which is being insured. From that point, an individual company can then make some individual determinations about how to set premium. This is not handled uniformly by all companies.

CHAIRMAN CRIPPEN stated that this would be similar to a group policy. If there are large enough numbers, the law of averages will handle the situation. The surcharge is for the benefit of the insurance company. It would not go into the pool to bring down the balance of the rates to the others in the pool.

Ms. Lenmark stated the good physicians in the pool would not have to pay the surcharge to provide the dollars necessary to pay on the claim. Without the surcharge, everyone in the pool would be paying some increment higher.

CHAIRMAN CRIPPEN asked if attorneys could structure payments on their fees?

Ms. Lenmark stated that is not regulated by statute.

CHAIRMAN CRIPPEN stated that most claims fall below the $250,000 cap. Only 2% meet the cap or exceed it. He asked the amount of damages awarded per case for the other 98%?

Ms. Jamison stated the total number of closed claims over $200,000, exclusive of defense costs, were 11 and the amount was $6.3 million. The total number of closed claims over $500,000 were 3, and they amounted over $4 million. The current total reserves in 1990 to 1992 was $16.9 million and the number of open claims was 204. The total number of claims between 0 and $250,000 was 96%; $250,000 to $500,000 was 2%; $500,000 and up was 2%. The number of paid claims between 0 and $250,000 was 88%; $250,000 to $499,000 was 8%; and $500,000 and up was 4%.

CHAIRMAN CRIPPEN stated the chart he had indicated the amount to be $125,000. He stated that with a cap there is the suggestion that the injured party could get that amount. Everyone would ask for that amount.

Ms. Jamison stated she doesn't believe the jury is told about the cap. In California the average of all settlements and jury

verdicts is $11,615. The U.S., excluding California, is slightly over $20,000. The caps put a limit on the volatility.

Closing by Sponsor:

REPRESENTATIVE GRIMES stated that even if the insurance industry can identify the two percent and separate them, the rest of the 98% would still face the vulnerability of the unstable awards in non-economic cases. This legislation will in no way limit the ability to go after bad doctors. After a certain amount of surcharges, insurance companies can drop doctors from insurance coverage.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 3/21/95
BILL NO. SB HB309

TESTIMONY OF MONTANA MEDICAL ASSOCIATION OF HOUSE BILL 309

Thank you for the opportunity to present testimony in support of House Bill 309.

House Bill 309 makes two significant changes in the law. First, it provides that in a malpractice claim, based on a single incident of malpractice, the amount a claimant may recover for "non-economic loss" may not exceed $250,000. It must be made clear that this limit applies to non-economic damages only. A claimant is not limited as to the amount of economic damages he may recover, nor is there any limit placed on the amount of punitive damages that can be recovered.

Non-economic damages are defined as a subjective, non-monetary loss, including, but not limited to pain and suffering, emotional distress, inconvenience, and other non-monetary losses. Economic damages, on the other hand, are monetary losses, that is, actual dollar losses and include a loss of earning capacity; medical, hospital, and other health care costs; and a loss of domestic services.

A number of states have imposed limits on non-economic damages for the purpose of controlling liability insurance premiums, and in turn, controlling health care costs. For example, California has enacted a statute limiting the recovery of non-economic damages to $250,000, which is the same limit proposed by H 309.

An example of how the bill would work if enacted is as follows: Suppose a claimant was awarded $500,000 for lost earning capacity, $500,000 for health care expenses, and $500,000 for pain and

The original of this document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 3/21/95
BILL NO. HB 309

JAMISON LAW FIRM
ATTORNEYS AT LAW
MONA JAMISON
STAN BRADSHAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: **Members of the Senate Judiciary Committee**

FROM: **Mona Jamison, Lobbyist for "The Doctors' Company"**

RE: **Testimony on HB 309 -- $250,000 Cap on Noneconomic Damages**

DATE: **March 21, 1995**

PLEASE SUPPORT HB 309 - TORT REFORM

Section 1 of HB 309 limits awards for *noneconomic* loss. Noneconomic damages are defined in Section (4)(d) of HB 309 to include subjective, nonmonetary losses such as pain and suffering, emotional distress, inconvenience, companionship, and other non-pecuniary damages. HB 309 does not limit recovery for *economic damages* such as lost wages and medical costs; they remain totally recoverable. These quantifiable, real damages are not affected by HB 309.

Skilled attorneys use the sympathy factor to manipulate juries into awarding high amounts for the subjective, noneconomic damages. Placing a cap on noneconomic damages significantly reduces the cost of all claims. The cap allows malpractice insurance carriers to keep premiums down, which in turn allows physicians to keep patient fees down and to continue delivering services. Lower premiums are a benefit in rural areas and also for physicians practicing in high risk specialties, such as obstetrics.

The vast majority (over 95%) of medical malpractice cases in Montana are settled out of court. The damages typically are not categorized as economic or noneconomic. The lack of a cap on noneconomic damages leads to increases in the amount of money required to settle cases without a trial even though the actual settlement may not involve damages specifically categorized as an award for "pain and suffering." The lack of a cap for these subjective, non-quantifiable damages encourages a lottery approach to settlement. Unpredictability in the area of noneconomic awards is a significant factor in rising premium costs.

In California, an extremely litigious state, medical liability premiums decreased 51% (1976-1994) after a $250,000 cap on noneconomic damages and periodic payment legislation was enacted. In Colorado, similar legislation forced premiums down 53% (1986-1994).

A CAP ON NONECONOMIC DAMAGES IS SINGULARLY THE MOST IMPORTANT ELEMENT OF STABILIZING AND REDUCING PREMIUMS FOR MONTANA PHYSICIANS. *PLEASE VOTE FOR HB 309.*

-END-

JAMISON LAW FIRM
ATTORNEYS AT LAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

MONA JAMISON
STAN BRADSHAW

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: **Members of the Senate Judiciary Committee**

FROM: **Mona Jamison, Lobbyist for "The Doctors' Company"**

RE: **Testimony on HB 309 -- Periodic Payments of Future Damages in Excess of $50,000**

DATE: **March 21, 1995**

PLEASE SUPPORT HB 309 - TORT REFORM

Section 2 of HB 309 allows settlements and judgments for "FUTURE" damages to be made in payments at regular intervals. Future damages are defined as payment for future medical treatment, care or custody, loss of earnings, or future noneconomic damages such as pain and suffering. Under this section, THE TOTAL DOLLAR AMOUNT OF THE PERIODIC PAYMENTS AWARDED TO THE PLAINTIFF MUST EQUAL THE TOTAL DOLLAR AMOUNT OF THE FUTURE DAMAGES WITHOUT A REDUCTION TO PRESENT VALUE (p. 2, lines 26-18). Major benefits of periodic payments are:

1. The injured patient receives more of an award under the periodic payment scheme proposed in Section 2 of HB 309 than with a lump sum award. The attorney, however, receives less. Under a lump sum scheme, the plaintiff's attorney's receives a greater fee because the fee is a percentage of a large amount (lump sum). With periodic payments, the plaintiff's attorney receives less because another section of the law requires the attorney's fee to be based on a percentage of the lump reduced to its present value.

2. Periodic payments contribute to insurance premium stability. When the periodic payment of future damages is mandatory, as proposed in HB 309, it is easier for the insurer to calculate appropriate reserves. When an annuity can be bought within premium limits, reserves are calculable. Large lump sum losses that exceed premium limits wreak havoc with reserves and contribute to premium instability. In less populated states, substantial premium increases can result from even one large verdict or settlement that must be paid in a lump sum.

3. The tax consequences of periodic payments are much more favorable to the plaintiff. A lump sum payment itself is not taxable. However, when that sum is invested, the interest is taxable. Likewise, when payments are periodicized, each payment (which includes imputed interest) is not taxable. Where a portion of the payment is invested, the taxable income is taxed at a lower rate than income from a larger, lump sum.

EXHIBIT 2
DATE 3-21-95
HB 309

4. When periodic payments are mandatory, settlement negotiations are more successful. When the plaintiff's attorney knows that future damages will be periodicized, the attorney will be less likely to take the case to trial because trial will not increase his or her chances of receiving a higher fee--the fee will be lower than under a lump sum payment.

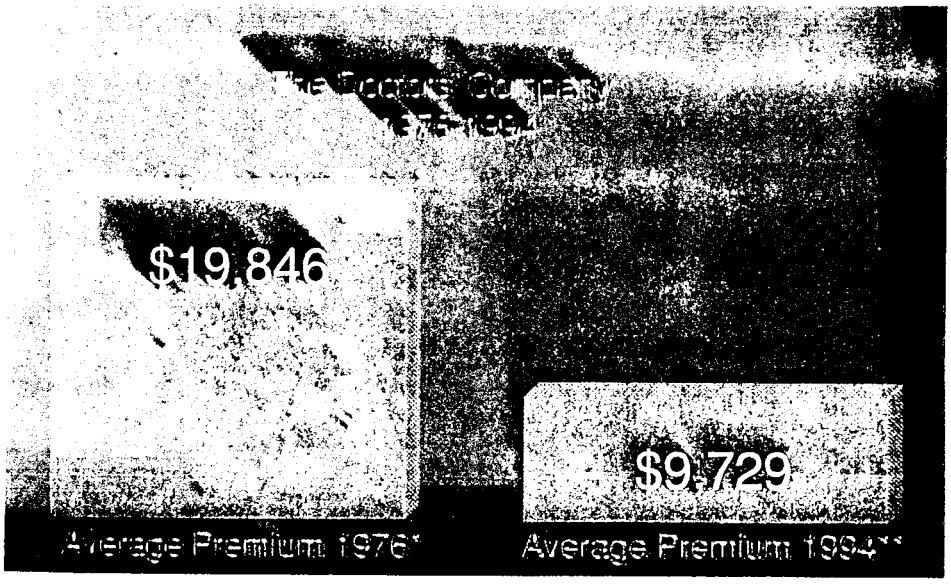
5. Experience shows that when periodic payment provisions are discretionary, such as in existing law, they are never ordered by the court. Thus, even though the mandatory periodic payment section is second in importance to the cap on noneconomic damages on premium stability, a mandatory requirement for periodic payments will contribute to premium stability.

6. Studies have shown that large lump sum payments are often depleted by the patient or the patient's conservator, often a family member. Since future damages awards are intended for future medical costs and lost wages, bad investments or extravagant expenditures use up the funds, which then become unavailable for their intended social purpose.

If you have questions concerning HB 309, please feel free to contact me.

-END-

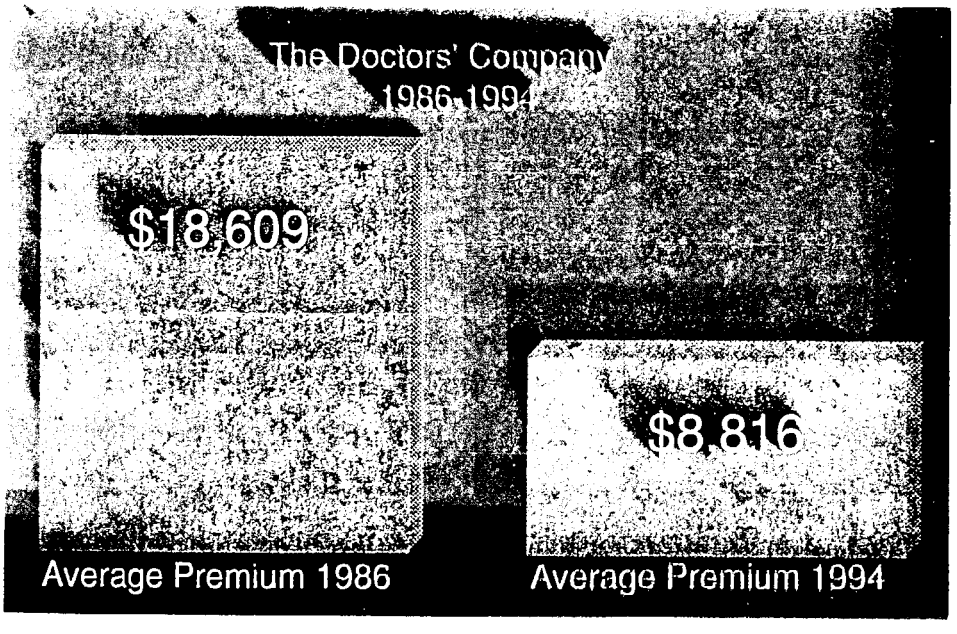
MICRA Reduces California Medical Liability Premium Rates by 51%



*$7,614 average premium adjusted to 1994 dollars on the December Urban CPI Index for a $1 Million / $3 Million Claims-Made Policy Premium

**After dividend deduction (where applicable) for a $1 Million / $3 Million Claims-Made Policy Premium

Tort Reform Reduces Colorado Medical Liability Premium Rates by 53%*

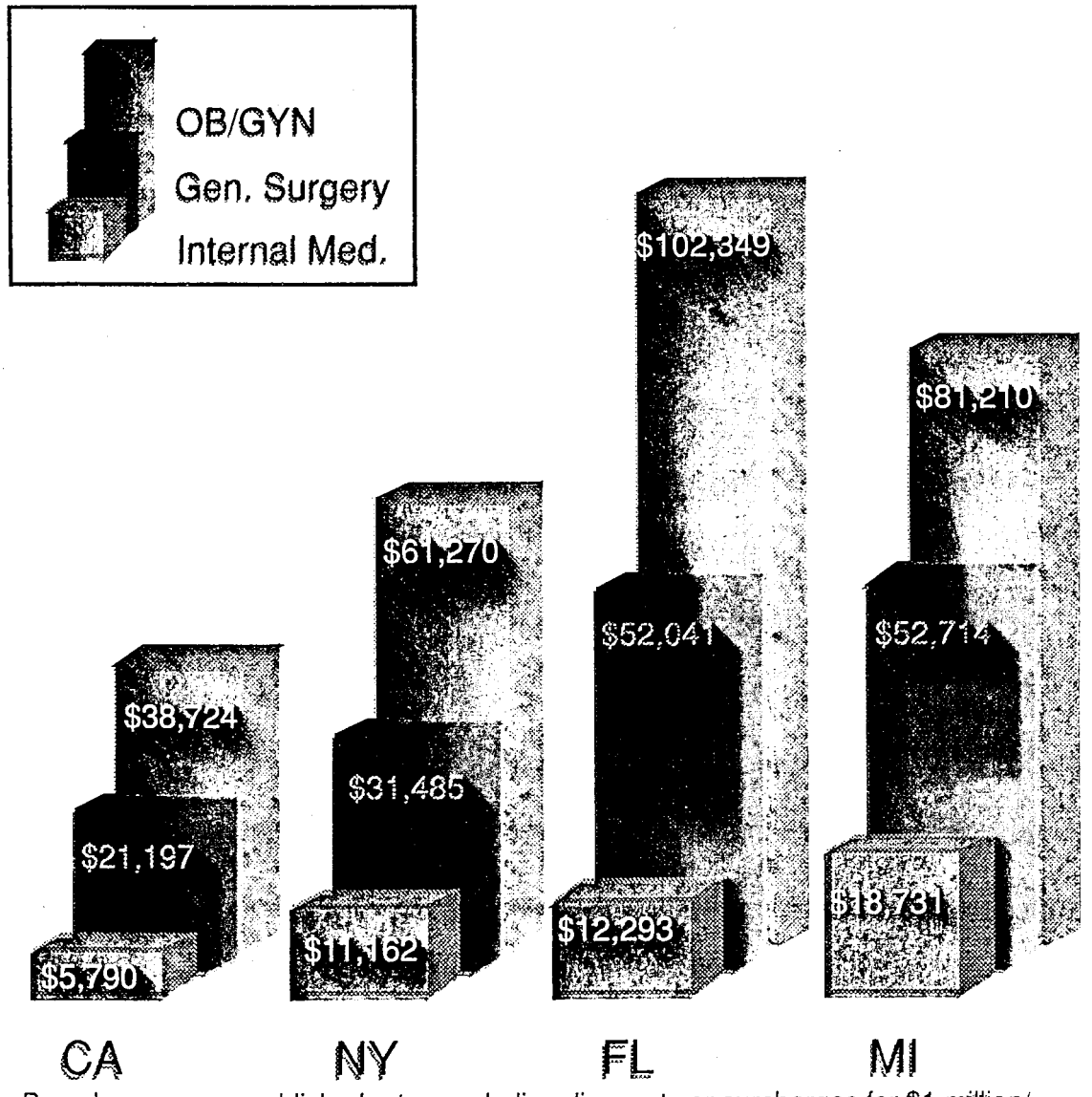


*The Doctors' Company's average of all specialties, including dividends for a $1 Million / $3 Million Claims-Made Policy Premium

EXHIBIT 2
DATE 3-21-95
HB 309

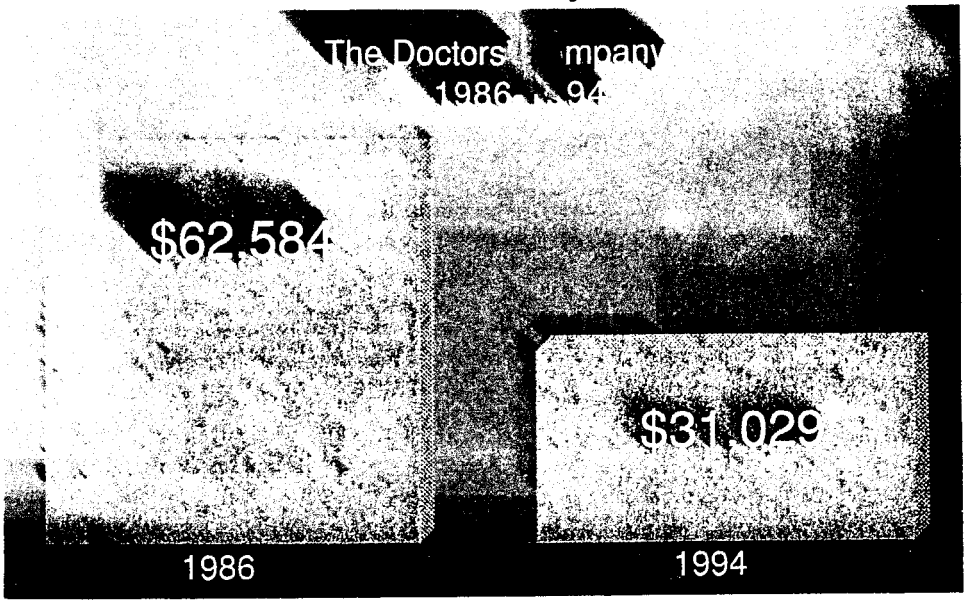
California Premiums Are Now Lower

Thanks to MICRA, liability insurance rates for California physicians are now one-third to one-half those paid by physicians in states that have failed to enact MICRA-like reforms, and that benefits all Californians.



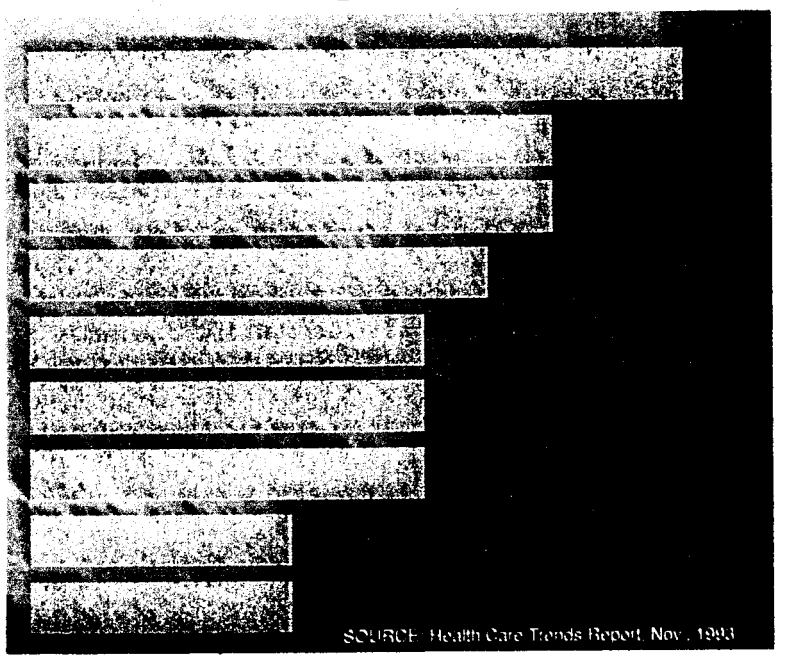
Based on average published rates excluding discounts or surcharges for $1 million/ $3 million in liabiltiy coverage.

Tort Reform Reduces Colorado OB/GYN Rates by 51%*



*The Doctors' Company's premiums, including dividends for a $1 Million / $3 Million Claims-Made Policy

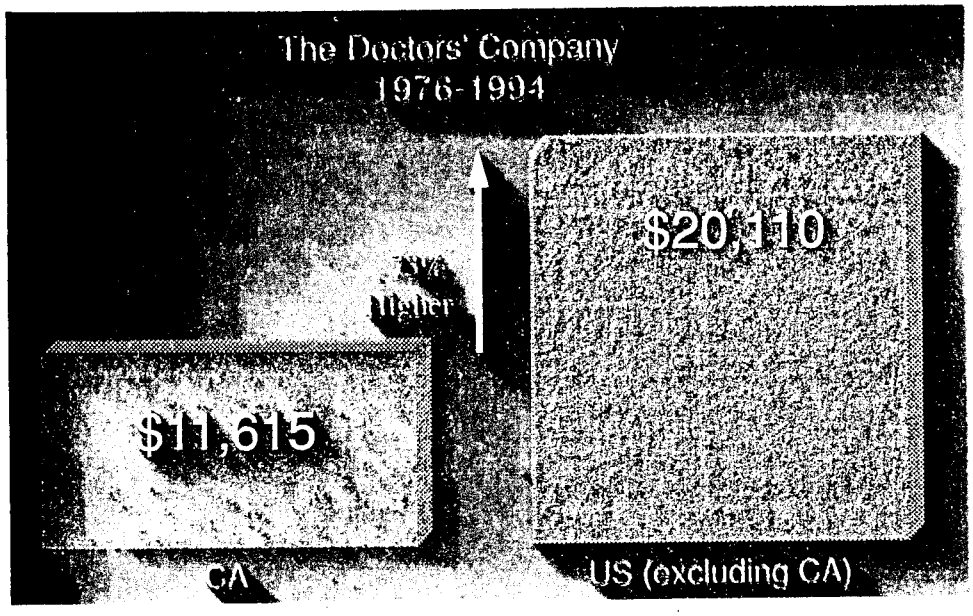
Average Annual Growth In Per Capita Spending 1980-1991*



*Includes per capita spending for hospital care, physician services, and prescription drugs

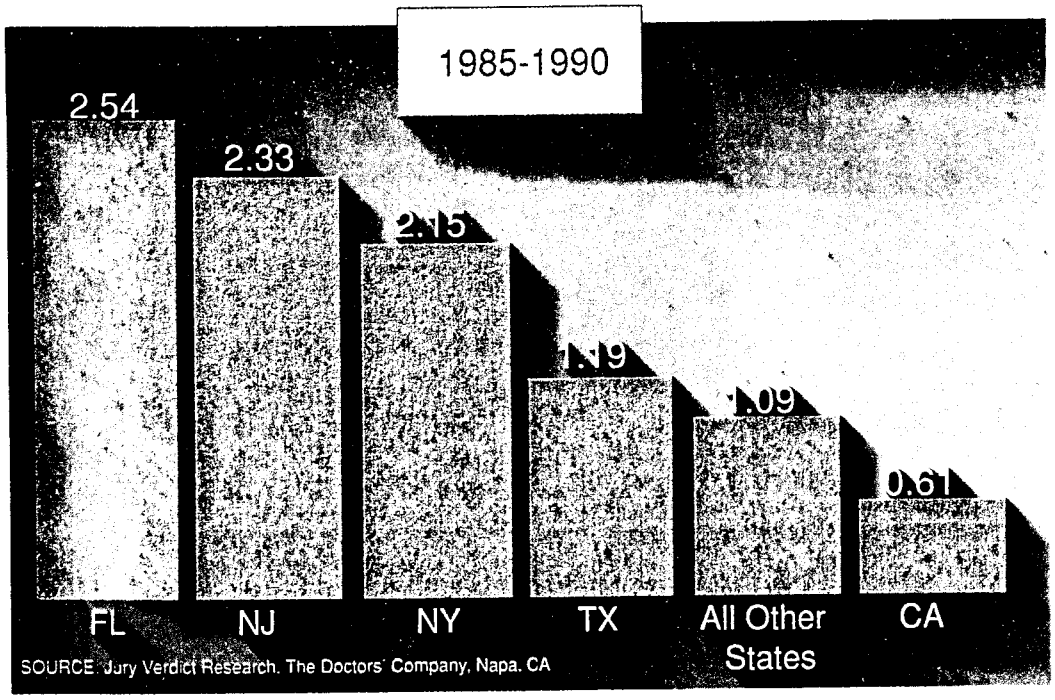
EXHIBIT 2
DATE 3-21-95
HB 309

Average of All Settlements & Jury Verdicts



MICRA Reduces Verdict Cost & Frequency

$1 Million + Verdicts Per 1,000 Doctors



HB 309

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 3/21/95
BILL NO. HB 309

March 21, 1995
~~February 2, 1995~~

Mr. Chairman and members of the committee.
My name is Nancy Clark, I'm from Ryegate, MT . I'm on the board of Trustees for the Wheatland Memorial Hospital in Harlowton Montana.

I speak in support of this bill.

It has been demonstrated that the states who have adopted similar legislation to this bill have lowered their mal-practice premiums rate

There is a direct correlation between insurance premiums - hospital cost - and services that can be offered.

In 1987 the Harlowton Hospital was forced to discontinue offering obstetrical services because of the increase in medical mal-practice insurance premiums for our doctors. We would no longer deliver babies.
This meant the women would have to travel 90 miles to Billings or 60 miles to Lewistown.

An average of 35 babies are born in Wheatland Co. per year. This means since 1987 280 babies have been born, granted not all these mothers would have delivered in Harlowton but a good share would have. Calculating the 280 births at the 1987 cost of $1800 dollars the Harlowton Hospital has lost revenue in the

neighborhood of $500,000. (5 Hundred thousand dollars). In a large number of cases the mother continues seeing a pediatrician where ever she deliver and we therefore lose additional revenue.

I think we have an obligation to the people of Montana to do everything we can to keep the cost of hospital care affordable and to offer quality service in each community. The end means of this bill will enable us to do this . I urge you to support this bill. Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 3/21/95
BILL NO. HB 309

March 21, 1995

Senate Judiciary / HB 309
Arlette Randash

Families across Montana have been impacted by the staggering costs of litigation and higher insurance premiums that result from product-liability and personal injury suits. It is estimated that the cost to the average household is $1,000 a year, or $300 billion to the United states economy as a whole. As I followed the MHCA across the width and breadth of the state in its deliberations this past year, medical malpractice reform was a high a high priority on everyone's mind. In the electronic forums conducted by the MHCA in Glasgow, Kalispell, and Great Falls 81% of surveyed said reducing malpractice suits was either *extremely important* or *important* in health care reform.

And the realities for Montana's families fall all to often on those of child bearing age. A acquaintance calling on small businesses in eastern Montana told me that one of the remaining OB-GYN's in Billings recently told him that in 1977 he delivered 3 babies a year to pay his liability insurance. In 1994 it took him 60 babies to pay his liability insurance. No wonder rural Montana families find it difficult to find a doctor to deliver their babies, being forced to drive long distances to find good medical care. A doctor, who specializes in delivery babies, I have consulted with over the past several months shared with me that their firm pays $64,000 a quarter for medical malpractice insurance and they've never had a case litigated against them! When similar legislation was successfully debated in the House of Representatives in Washington D.C. earlier this month, Representative Henry Hyde, Chairman of the House Judiciary, understood the implications for families saying "the people are important and they will benefit. The business community is important and they will benefit." He said the bills would cut down on frivolous lawsuits.

A spokesman for the Girl Scout Council in metropolitan Washington D.C. said recently that just that local area must sell 87,000 boxes of Girl Scout cookies each year just to meet their liability insurance.....funds that could otherwise be used to help fund Girl Scout activities! That's a lot of cookies!

Interestingly enough, their are huge political payoffs in this battle. A recent article in Human Events reported that in the two years leading up to the 1992 election the American Trial Lawyers Association representing a group whose members make around $20 billion a year gave $2.4 million in political contributions, 92% of it to the Democratic party.

You have undoubtedly felt intense pressure from the trial lawyers to gut or kill medical malpractice reform that is meaningful. I urge you to resist the pressure and give the careful scrutiny this bill deserves and favorable consideration to its passage. Montana's families deserve as much.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 3/21/95
BILL NO. HB309

Chairman, Members of the committee:

For the record my name is Laurie Koutnik, Executive Director of Christian Coalition of Montana our states largest family advocacy organization.

Christian Coalition of Montana Supports HB 309.

From the beginning of the Health Care reform debate, our organization recognized the need for torte reform. From our initial conference with Governor Racicot on Health Care reform, he assured us that this issue would be addressed. All of us recognize that torte liability is one of the primary factors in driving up the cost of health care. So if we truly want "affordable" health care as prescribed in SB 285 - torte reform needs to be addressed.

Although we do not know exactly how much the torte system adds to our medical costs, it is perceived to be quite large when you take into account attorney fees, damage awards, court costs and all the unseen costs, such as defensive medicine practiced by doctors where extra tests are conducted out of fear of a lawsuit.

The medical torte liability alone is estimated to cost about $360.00 per year per household - far beyond what a family spends on routine preventive services.

In a report issued by the National Center for Policy Analysis, the torte system is referred to as "another bureaucracy, replete with its own perverse incentives. Moreover, it is a bureaucracy that feeds off the health care sectors with little consideration of the damage it causes '.

And this is what Representative Grimes has addressed today - a framework to address this bureaucracy's damages and to reduce the liability aspect. Those with profit motivation would have you think otherwise.

In the Christian Coalition legislative candidate survey conducted prior to the November election, we asked you, the respondents your positions on torte reform in health care.

Overwhelmingly 94% of the respondents checked "supports" - the other 6% were " undecided". Some of you were concerned with the direction torte reform would take.

However, the Governor and his staff have thoroughly studied this issue and have in our opinion presented a fair plan. Placing a cap on noneconomic damages not to exceed $250,000 is a reasonable resolve.

If we are ever going to truly address cutting the runaway costs of health care, then torte reform is essential. I recommend a do pass on HB309.

Respectfully submitted: Laurie Koutnik, Executive Director, Christian Coalition of Montana
3/21/95

THE DOCTORS COMPANY

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 2/21/95
BILL NO. HB 309

December 30, 1991

Harold V. Dye
Milodragovich, Dale & Dye
620 High Park Way
Missoula, MT 59803

COPY FOR YOUR INFORMATION

RE: Albert T. Joern, M.D.

Dear Mr. Dye:

First, let me apologize for the delay in getting this to you. Dr. Joern was covered under policy #31365-0001. This policy became effective on 7/1/83 and was cancelled on 7/1/88. An extended reporting policy was purchased and became effective on 7/1/88. The extended reporting policy will cover claims that occurred between 7/1/83 and 7/1/88 but are not reported until after 7/1/88. Policy #31365-0001 carries policy limits of $1 million per claim and $3 million aggregate.

The following is a list of those claims reported under policy #31365-0001 and their disposition and/or current status:

File No: 65334A; Victor Peltier vs. Albert Joern, M.D.; status - closed 2/26/88; settlement - $32,000.

File No: 66010A; Dan Meritt vs. Albert Joern, M.D.; status - closed 2/25/88; settlement - $15,000.

File No: 66693A; Joe Foote vs. Albert Joern, M.D.; status - closed 3/26/90; settlement - $194,888.

File No: 66835A; Irene Butts vs. Albert Joern, M.D.; status - closed 5/25/88; settlement - $299,629.77.

File No: 66833A; Peter Tiffany vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 66844A; John Dunster vs. Albert Joern, M.D.; status - closed 9/15/87; longstanding inactivity.

File No: 69468A; Roger Bowman vs. Albert Joern, M.D.; status - closed 7/9/91; settlement - $383,000.

2033 Sixth Ave., Suite 400
Seattle, WA 98121-2526
206/448-1664
800/548-0799

File No: 70217A; Ivan Meyer vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 71314A; Leona Nedved vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 71718A; Robert Snyder vs. Albert Joern, M.D.; status - closed 8/31/89; settlement - $95,000.

File No: 73001A; Dale Guenther vs. Albert Joern, M.D.; status - closed 6/28/90; longstanding inactivity.

File No: 73339A; Rick Potuzak vs. Albert Joern, M.D.; status - closed 11/25/91; dismissed.

File No: 73877A; James Schreckendgust vs. Albert Joern, M.D.; status - closed 8/30/89; dismissed.

File No: 76432A; Donald Davis vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 79900A; Russell Wick vs. Albert Joern, M.D.; status - open; litigation ongoing.

File No: 80280A; Anthony Araiz vs. Albert Joern, M.D.; status - open; litigation ongoing.

Those claims which remain open carry a $1 million per claim limit. I hope this information is helpful.

Best Regards,

Linda Adams Tucker

Linda Adams Tucker
Claims Director
Washington Office

LAT:pr

cc: Albert Joern, M.D.

EXHIBIT 6
DATE 3-21-95
HB 309

"PROBLEM" PHYSICIANS

An Example . . .

Dr. Albert T. Joern

Annual Income	**$197,000.**
Unpaid Taxes	
--U.S.A.	**$60,215.**
--Montana	**20,044**
--Flathead Co.	**3,985.**
TOTAL	**$84,244.**

91-51214-13

CHAPTER THIRTEEN STATEMENT

Each question shall be answered or the failure to answer explained. If the answer is "none" or "not applicable" so state. If additional space is needed for the answer to any question, a separate sheet, properly identified shall be used and attached.

The term "original petition" means the original petition filed under §301 of the Code or, if the Chapter Thirteen case was converted from another chapter of the Code, it means the petition by or against you which originated the first case.

This form must be completed in full whether a single or joint petition is filed. When a joint petition is filed, the requested information must be provided for each petitioner.

All questions are to be answered by debtor if unmarried, otherwise for each spouse whether a single or joint petition is filed unless spouses are separated and a single petition is filed.

FILED
BERNARD F. McCARTHY, CLERK
JUL 23 1991
BANKRUPTCY COURT
by Kathy Scholer
Deputy Clerk

	DEBTOR	SPOUSE
1. Name and residence		
(a) Full name	Albert Terry Joern	Heather Joern
(b) Residence	188 Terrace Road Kalispell, MT 59901	188 Terrace Road Kalispell, MT 59901
(1) Mailing address	Same as above	Same as above
(2) Telephone number including area code.	(406) 257-8155 H (406) 752-2141 W	(406) 257-8155
(c) What does debtor consider his residence if different from that listed in (b) above.	N/A	N/A
2. Occupation and Income		
(a) Present occupation. If more than one, list all.	Physician	Housewife
(b) Name, address and telephone number of employer. Badge or card number of employee.	575 Sunset Blvd, Suite 207 Triangle Building Kalispell, MT 59901 Self-employed	188 Terrace Road Kalispell, MT 59901
(c) How long has debtor been employed by present employer?	Eight Years	Six Years
(d) Name of previous employer and nature of employment if employed less than one year by present employer.	N/A	N/A

EXHIBIT 6
DATE 3-21-95
HB 309

	DEBTOR	SPOUSE
(e) Has debtor operated a business, in partnership or otherwise, during the past three years.	Northwest Neurosurgical & Rehabilitation Clinic. (debtor and spouse). Northern Rockies Rehabilitations (partnership. Northern Health Care.	
If so, give particulars, including names, dates and places.	January 1988 thru June 1988 1280 Burns Way, Kalispell, Montana	
(f) Answer the following questions.		
(1) Gross wages, salary or commissions per pay period.	$ 197,000.00 per year	$ -0- per
(2) Payroll deductions per pay period.		
(a) Payroll taxes including social security.	$ -0-	$
(b) Insurance	$ -0-	$
(c) Credit union	$ -0-	$
(d) Union dues	$ -0-	$
(e) Other deductions Norwest Bank loan	$ 3,000.00	$
Specify	$	$
Specify	$	$
(3) Take home pay per pay period. (monthly)	$ 13,416.67	$ -0-
(4) Gross income for last calendar year.	$ 150,401.00	$ -0-

12. Debts

(a) Debts having priority

(1) Nature of claim	(2) Name of creditor and complete mailing address including zip code.	(3) Specify when claim was incurred and the consideration therefore; when claim is subject to setoff, evidenced by a judgment, negotiable instrument or other writing or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	(4) Indicate if claim is contingent, unliquidated or disputed.	(5) Amount of claim
(a) Wages, salary and commissions, including vacation, severance and sick leave pay owing to employees not exceeding $2,000.00 to each, earned within 90 days before filing of petition or cessation of business. (If earlier specify date.)				-0-
(b) Contributions to employee benefit plans for services rendered within 180 days before filing of petition or cessation of business. (If earlier specify date.)				-0-
(c) Deposits by individuals, not exceeding $900.00 for each, for purchase, lease or rental of property or services for personal, family or household use that were not delivered or provided.				-0-
(d) Taxes owing Itemize by type of tax and taxing authority				
(1) To the United States	IRS Ogden, UT 84201		Back Taxes 1990 Taxes	30,083.52 30,133.00
(2) To any state	Montana Dept of Rev. Mitchell Bldg. Helena, MT 59620		Back Taxes 1990 Taxes	11,142.28 8,902.00
(3) To any other taxing authority				-0-

TOTAL ..... $ 80,260.80

EXHIBIT 6
DATE 3-21-95
HB 309

FILED
BERNARD F. McCARTHY, CLERK
OCT 9 1991
BANKRUPTCY COURT
by Kathy Schelin

Harold V. Dye, Esq.
MILODRAGOVICH, DALE & DYE, P.C.
Attorneys at Law
P.O. Box 4947
Missoula, Montana 59806-4947
Telephone: (406) 728-1455
Attorneys for Debtors

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

IN RE ALBERT TERRY JOERN and HEATHER JOERN, Debtors.	Case No. 91-51214 (Chapter 13)

AMENDMENT TO SCHEDULES

COMES NOW Harold V. Dye, attorney for debtors in the above voluntary proceeding, and pursuant to Bankruptcy Rule 1009 amends the Schedule A-2 filed herein as follows:

Flathead County Treasurer Flathead County Courthouse Kalispell, MT 59901	Real estate taxes (Secured by tax lien)	$3,985.47

DATED this 9th day of October, 1991.

MILODRAGOVICH, DALE & DYE, P.C.
P.O. Box 4947
Missoula, Montana 59806-4947
Telephone: (406) 728-1455
Fax: (406) 549-7077
Attorneys for Debtors

By _____
Harold V. Dye

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 3/21/95
BILL NO. HB309

Directors:
Wade Dahood
Director Emeritus
[illegible]te D. Beck
[illegible]abeth A. Best
Michael D. Cok
Mark S. Connell
Michael W. Cotter
Patricia O. Cotter
Karl J. Englund
Robert S. Fain, Jr.
Victor R. Halverson, Jr.
Gene R. Jarussi
Peter M. Meloy
John M. Morrison
Gregory S. Munro
David R. Paoli
Michael E. Wheat

Montana Trial Lawyers Association

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

Officers:
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Secretary-Treasurer
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Paul M. Warren
Governor

March 20, 1995

Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: House Bill 309

Mr. Chair, Members of the Committee:

Thank you for this opportunity, in advance, to express MTLA's opposition to HB 309, which (1) severely limits compensation for ***both physical and mental*** injuries resulting from substandard medical care and (2) allows hospitals and doctors responsible for future damages, ***both economic and noneconomic***, to dictate installment payments.

MTLA agrees with the findings of Sen. Del Gage's Joint Interim Subcommittee on Insurance Issues:

> "The data does not support claims that there is a medical malpractice crisis in Montana. Professional liability insurance for health care providers is available at competetive rates. Very few claims result in lawsuits, and those that do are settled, more often than not, in favor of the defendant." (Page 41)
>
> "After 12 months of study, the Subcommittee concluded that the evidence presented to the Subcommittee did not support the contention that there was a medical malpractice crisis in Montana that warranted the passage of specific tort reform measures. Further, no evidence was presented that supported the contention that the passage of tort reform measures would result in health care cost savings, either to health care providers or consumers." (Page 64)

House Bill 309. The bill itself prescribes complex and unjust side-effects for even the most innocent victim of the most inexcusable medical negligence:

1. Section 1, which limits recovery for "noneconomic loss," protects the worst Montana health-care providers most. *No matter how gross the negligence may be, no matter*

how hungover or bored or debilitated by age the provider may be, no matter how many previous acts of malpractice the provider has committed, House Bill 309 insulates them from accountability for the damage they cause.

2. Section 1, which purportedly limits recoveries for "noneconomic loss" in order to control medical-liability premiums, insulates ***even those Montana health-care providers who choose to "go bare."*** Why protect providers who won't protect their own patients?

3. Section 1, which limits recovery for "noneconomic loss," ***abandons the common-sense recommendation of Governor Stephens' Health Care for Montanans Committee that any such caps on non-economic damages exclude physical impairment and disfigurement.*** In fact, for the first time in Montana history, the bill (at page 2, lines 22-29) creates an entirely new and ill-defined category of civil damages for something called "subjective, nonmonetary loss." The proponents of HB 309 apparently presume that the definition of "noneconomic loss" encompasses such *objective* losses as paralysis, chronic vomiting, blindness, sterility, and death, even when expert testimony and authoritative data establishes for a jury the *monetary* value of such losses. MTLA disagrees.

4. Section 1 (unlike its California "model") actually reduces compensation for "noneconomic losses" ***far below $250,000*** whenever ***multiple*** claimants or ***multiple*** health-care providers are involved. The pink attachment illustrates circumstances in which multiple patients of a hospital or clinic are injured by a single act of medical negligence. Far more often, House Bill 309 will subject the members of large families and the members of small families to dramatically different caps, even when both families lose a mother or father to substandard medical care under identical circumstances.

5. Section 1 requires that *other* statutory reductions already required by Montana law (i.e., benefits received from a patient's *own* health-insurance policy) must be applied ***after, not before,*** the application of the new $250,000 cap. In other words, $250,000 is merely a *theoretical* cap--most awards will actually be far smaller.

6. Section 1 particularly ***disadvantages women and children,*** who use--and need--the majority of health care services. Women and children often cannot demonstrate the loss of long-term, high-paying employment, and they suffer more from such non-economic injuries as disfigurement, emotional trauma, and sterility.

7. Section 1 ***prevents a jury from considering*** the real consequences of their decision. Nothing undermines House Bill 309 more than its insistence on *tricking* the jury. Nothing refutes the artificial distinction between economic and noneconomic losses better than this admission that juries *can* react to caps by compensating others types of loss more generously. And nothing more profoundly confirms the fact that *defendants* in medical-malpractice cases, not plaintiffs, demand jury trials and refuse judge trials.

8. Sections 2 and 3 allow a losing provider or its insurer to ***dictate installment payments for economic and noneconomic damages alike.*** And (again unlike its California "model") HB 309 permits a losing provider and its insurer to ***walk away*** after purchasing the lowest-priced annuity available, even if the annuity company it selected fails.

9. Sections 2 and 3, which mandate periodic payment of future damages at the request of a losing provider or liability insurer, impose additional hardships on those few victims of medical malpractice--*especially elderly and critically injured victims*--who survive litigation but may not live for the full installment period. Many claimants and providers voluntarily agree to periodic payments now. And ***Montana law already permits judges to order periodic payments*** when they are in the best interest of the victim.

10. By forcing successful claimants to bear the risk of insurance-company insolvency, Sections 2 and 3 allow a losing provider or liability insurer to shift costs onto the victim of medical negligence--or, more often, *onto Montana taxpayers,* who finance such social services as Medicare and Medicaid.

Background. Montana does not need HB 309:

1. Medical malpractice accounts for less than one percent of Montana's annual health care bill. If absolutely all liability for medical malpractice were abolished and all health care providers were somehow completely protected from lawsuits, the price of a $40 office visit would decline ***approximately 25 cents.***

2. The absence of doctors in rural areas of Montana is *not* attributable to medical liability premiums (see blue attachment). HB 309, by benefitting far more urban doctors and specialists than rural doctors, will *not* improve rural access.

3. The number of Montana doctors, including family physicians and OB-GYNs, is *increasing*. Montana's health-care industry is growing vigorously. (See yellow attachment.)

4. The average Montana doctor earned well more than $100,000 last year, even *after* they paid all liability premiums and other expenses. *Montana doctors pay a smaller proportion of their net income for liability insurance than Montana truckers do.*

5. Contrary to proclamations by proponents of House Bill 309, "***the sky is NOT the limit***" in determining noneconomic damages: no medical-liability insurance policy provides unlimited liability coverage. In fact, insurance companies themselves could easily "cap" noneconomic damages simply by distinguishing in their policies, as they now ask the Montana Legislature to distinguish in law, between economic and noneconomic losses. And regardless of House Bill 309, two factors will continue to dominate the liability premiums paid by Montana doctors: first, the potentially *catastrophic nature* nature of injuries caused by medical malpractice; and second, the ***refusal of medical-liability insurance companies*** to significantly raise premiums for repeatedly careless doctors or lower premiums for rural doctors who treat fewer patients. The only certain result of HB 309 will be increased insurer profits (see green attachment).

6. ***Only one in 16 victims of medical malpractice receive compensation for their injuries.*** In fact, *even in cases where the liability insurer labels the doctor's conduct indefensible,* victims who go to trial lose as often as they win (see salmon attachment).

7. The costs of medical malpractice insurance are determined by the costs of medical malpractice. *More Montanans die every year because of medical malpractice than because of traffic accidents.*

8. Montana doctors and their insurance companies choose to settle the vast majority of malpractice claims, often in order to keep those settlements confidential. In the decade 1984-1994, *only 8 percent of Montana doctors* have paid more than one malpractice claim, yet that minority has accounted for *58 percent of all malpractice settlements* and *63 percent of all payments* to malpractice victims (see purple attachment). In fact, according to the Montana Board of Medical Examiners, "repeater" physicians averaged $273,627 in payments to malpractice victims over the decade, compared to just $76,209 for those Montana physicians who paid a single claim and $34,642 for all Montana physicians combined. *Yet the patients of Montana's worst "repeater" physicians have no right to that information.*

9. Doctors grossly misperceive the threat of malpractice suits. Consequently, HB 309 will not reduce the "bad defensive medicine" which results from doctors' exaggerated, persistent misperceptions about legal liability. HB 309 will, however, reduce the "good defensive medicine" which ensures quality care and thus lowers the enormous cost of medical accidents.

10. The proposals contained in HB 309 differ significantly from statutes in California, Colorado, and other states. The proposals in HB 309 have not reduced medical liability premiums or payments to malpractice victims, restrained overall health care costs, or improved access to medical care in other states. Moreover, Montana has already enacted numerous so-called tort reform proposals at the request of health care providers, including drastic reductions in the statutes of limitations applicable to children (1987 and 1989) and mandatory screening panels which require victims to await action by an administrative panel before filing suit (1977). The proponents of HB 309 ignore the absence of similar "reforms" in other states.

In short, the very health-care providers who thrive by treating the pain and suffering of Montanans now ask this Legislature to disregard the pain and suffering caused by substandard medical treatment. The same health-care providers who resist "cookbook medicine" and describe proper treatment as an art now ask this Legislature to discount noneconomic damages because of their "subjectivity." Montanans deserve better.

Thank you for considering these comments and the accompanying materials. If I can provide additional information, verification, or assistance, please contact me.

Respectfully,

Russell B. Hill, Executive Director

EXH 7 3-21-95 HB 309

SATURDAY
March 26, 1994

Billings Gazette

TEMPO

Miroslav Kocman is the envy of many of his countrymen in the Czech Republic. He's attending school in the U.S.

PAGE 1C

108th year, No. 331

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THE WEATHER SC

■ CANCER CENTER INVESTIGATION

Patients get wrong radiation

8 women received overdoses because of computer error

By PAT BELLINGHAUSEN
Of The Gazette Staff

A computer miscalculation that caused eight cancer patients to get more than their prescribed doses of radiation treatment has prompted the Nuclear Regulatory Commission to investigate the Northern Rockies Cancer Center in Billings.

In a press conference Friday morning, the cancer center and its owners, Deaconess Medical Center and St. Vincent Hospital, issued a joint statement saying that all eight women who received an incorrect dose of radiation and their doctors have been notified of the situation.

No known complications have occurred, the hospitals said in a joint press release read by radiological physicist Marc Edwards, associate director of physics at the cancer center, which treats more than 600 patients a year.

"There has been no escape of radiation into the environment," Edwards said at the press conference. "The problem has involved only eight patients."

Early this week, it was found that a patient had actually received more radiation than prescribed because of the computer problem. Since then, the other seven cases were identified and the hospitals and cancer center focused on notifying all affected patients before making the problem public.

He said that even the overdoses found were "within the range of accepted dosages."

The computer problem has been corrected, Edwards said.

"We have researched all calculations," he said. "There are no other patients. No one else is involved, but we would be glad to answer any patient's questions."

Carie Mackay, public relations director for the cancer center, suggested that patients who have concerns should call the center at 248-2212. Over the weekend, that

(More on Cancer, Page 14A)

Gazette photo by James Woodcock

Radiological physicist Marc Edwards talks to the media.

> "There has been no escape of radiation into the environment."
>
> —Marc Edwards
> cancer center official

Gazette photo by Larry Mayer

From left, Drs. Fred Deigert, Mark Dion and Walter Gunn discuss concerns about the management of Northern Rockies Cancer Center at a Friday afternoon press conference. They made their comments in the office of attorney Rob Stephens, right.

Doctors criticize policies at center

By PAT BELLINGHAUSEN
Of The Gazette Staff

Three Billings radiation oncologists leveled criticism at management and staffing policies of the Northern Rockies Cancer Center Friday in the wake of a revelation that eight patients received overdoses of radiation.

One thing Drs. Fred Deigert, Mark Dion and Walter Gunn want people to know is that none of their patients was overdosed. They said the same is true for their partner, Dr. Fred Lindemann of Sheridan, Wyo., who wasn't present at the press conference.

The doctors, who are partners in Radiation Oncology Associates, aired their grievances in a Friday afternoon press conference at the office of their attorney, Rob Stephens. The physicians provide radiation treatment to patients at cancer centers in Sheridan, Wyo.; Miles City; Bozeman; and Billings, Deigert said. About half of their patients are seen in Billings.

Attorney states opinions

Stephens, who talked at length during the conference, prefaced most of his remarks by saying he was stating only "his opinion" and "conjecture." Asked if his clients planned litigation against the cancer center or its owners, St. Vincent Hospital and Deaconess Medical Center, Stephens said he wouldn't say.

But he did discuss a lawsuit the medical group filed in 1984 against the cancer center over medical staff policy.

The radiologists in Stephens' office said they were notified in November that the cancer center staff would be closed. Their newest associate, Dion, has not been able to get on staff.

The radiologists also criticized the cancer center's closed staff policy for radiological physicists. "The idea of having a so-called closed staff ... inhibits the free exchange of ideas and the ability to pick up mistakes," Gunn said.

On the computer problem that will be the subject of a Nuclear Regulatory Commission Investigation beginning next week, Deigert said that as of Friday, the doctors in his group had been unable to get information from the hospitals on exactly what had happened and the patients involved.

"We had to call the Nuclear Regulatory Commission to find out what was going on in Billings and that is unacceptable," he said.

Official confirms staffing

Later Friday, Cancer Center Administrator Doug Carpenter confirmed that the only two radiological physicists at the cancer center are employees of the center and that the radiologists were notified Nov. 30 that the staff was closed to new applicants.

But Carpenter declined to comment on the radiologists' criticisms, citing the previous lawsuit and uncertainty about future litigation.

THE NEW YORK TIMES A12
September 27, 1993

19,000 Cancer Tests Rechecked After Misreading

Special to The New York Times

NEWPORT, R.I., Sept. 26 — An independent laboratory is re-examining 19,000 Pap smears performed at Newport Hospital since 1988 after a woman who had tested negative four times in eight years died of cervical cancer last spring.

Of 1,190 Pap smears rechecked so far, investigators have found that in 17 cases women were told they did not have cancer when the tests actually indicated early signs of cervical cancer.

A separate re-examination of 407 of the hospital's Pap tests by Federal investigators in May turned up 12 that had been misread.

Acknowledging that "terrible mistakes" had been made, Robert J. Healey, the president of the private nonprofit hospital, offered a public apology at a news conference on Friday and announced that the hospital was offering to pay for a new Pap smear for any woman whose test had been evaluated in its laboratory in the last five years.

Federal Investigation

The problem at Newport Hospital came to light when state and Federal agencies began investigating the laboratory's results in May, just days after the woman's death. Investigators reported finding many technical and procedural errors in the way the hospital's laboratory handled and read Pap smears. As a result of the investigation, the hospital was instructed to conduct an extensive review of tests in which it reported no signs of pre-cancerous or malignant cells.

The Pap smear, a test named for its inventor, Dr. George Papanicolaou, is widely used to detect cancer of the cervix. In the 65 years since its introduction, the death rate from cervical cancer has dropped by 70 percent, medical experts say.

Among the Pap smear slides being re-examined are tests performed at the hospital and tests sent to the hospital's laboratory by private doctors. Since the laboratory's problems were reported a week ago by The Providence Journal Bulletin, gynecologists in Newport County have received a steady stream of calls from angry and worried women.

Investigators found evidence that the hospital laboratory was using incorrect or misleading terms when reporting its results, that training for the technicians who examined the slides was inadequate, and that procedures in the laboratory were sloppy.

Without any public announcement, Newport Hospital stopped processing Pap smears in May but resumed testing in August with State Health Department approval after overhauling its procedures and increasing training for its lab workers.

Rechecking Slides

Since early June, a private laboratory approved by the state has been rechecking the slides examined by the hospital from May 20, 1988, to May 20 of this year. The examination will probably not be completed until next spring. In each of the 17 misread cases found so far, the hospital had classified the results as normal or near normal. But the re-examination showed that 10 had indicated "low-grade pre-cancerous cells" and seven had indicated "high-grade pre-cancerous cells."

In each of these cases the women should have been informed of their conditions so they could have taken sought cancer treatments. Hospital officials say the 17 women have since been notified.

Federal investigators who checked 407 slides in May, also found 12 misread tests, but hospital officials say those tests were among the 17 found by the private laboratory.

The investigations of the hospital's laboratory were prompted in large part by the case of Helene Lewis, a special education teacher and vice chairwoman of the Newport School Committee, who died of cervical cancer on May 3. Officials say there was also another case in which a woman has informed the hospital that she believed her Pap smear was misread. The hospital has declined to release details of that case, though Mr. Healy said today that the woman was still alive.

A Rhode Island hospital admits that Pap smears were mishandled.

Multiple Misreadings

The hospital laboratory had misread four Pap smears of Ms. Lewis between 1984 and 1992, telling her that the results were normal or nearly normal when in fact she had a tumor. Investigators re-checking the slides found pre-cancerous cells in the 1984 slide and malignant cells in her 1989 and 1991 Pap smears. Ms. Lewis, a daughter of a former Newport Mayor, Dean Lewis, had been told she was free of cancer three weeks before her malignant tumor was found.

Ms. Lewis's sister, Katherine Lewis Saleh, said that Ms. Lewis had been suffering with pain for quite a while before her cancer was actually discovered. "Helene was going back and forth to the emergency room because she had this pain in her abdomen," she told The Journal Bulletin. "I remember one time they sent her home with antibiotics and told her it was a vaginal infection. One week would go by and she'd say it's getting worse. Then she'd go back to the E.R. and they'd send her off with painkillers. She must have gone at least three times."

When Newport Hospital later discovered that it had misread the Pap test results of Miss Lewis, it notified its insurer but not the Health Department.

An official of the Rhode Island Health Department said that hospitals in this state have no legal ouligation to notify patients or the state of medical errors, regardless of how serious.

At Friday's press conference Mr. Healey said, "We are deeply sorry for the anguish we have caused the community and we offer our condolences to the Helene Lewis family who have suffered most of all.

"Like any other human endeavor we are not perfect," the hospital president said. "This hospital will not run away from what happened here. Our laboratory made some terrible mistakes and I am here to stand up to them and to tell you what we are doing about them."

Four lab technicians "who had problems reading Pap smears, no longer work here at this hospital, Mr. Healy said. He said they had either resigned or had been dismissed.

The pathologist who formerly headed the lab, Dr. Marvin Chernow, has retired and the hospital has announced plans to conduct "an outside audit of his other diagnostic work."

New Notifications

The hospital will notify by mail every woman who has had a Pap smear read at its laboratory within the last five years about the potential problems relating to those analyses and of the hospital's offer to pay for another test and a re-examination of their most recent test.

If further mistakes are uncovered in the review of the 19,000 Pap smears, the hospital will immediately notify both the patient and her doctor by certified mail, Mr. Healey said.

He said Dr. Scott Wang who heads the hospital's new pathology team "is one of the best in his profession." Dr. Wang is a board-certified cyto-pathologist, a specialty that includes the interpretation of cervical Pap smears.

Mr. Healey said the hospital will also establish an outside review system to continually monitor the performance of its laboratory technicians and the doctors who supervise them.

Plains hopes to get back in the baby business

By JOHN STROMNES
of the Missoulian

PLAINS – Clark Fork Valley Hospital in Plains has embarked on a $122,000 fund-raising campaign among Sanders County's 9,000 residents to help outfit a new obstetric unit.

"We've never gone to the community before to fund a major hospital project," said Bina Eggensperger of Thompson Falls, a board member of the nonprofit hospital and the fund-raising coordinator.

The county has only about 9,000 residents, so it will be a significant challenge to raise that amount by September, when the hospital administration hopes to begin delivering babies again. About 120 babies are born in the county each year, and the hospital expects about half of that number to use the hospital OB unit if it is opened.

In 1986, citing high costs caused by skyrocketing malpractice insurance rates and a lack of physicians willing to offer obstetric services, the hospital closed its obstetric unit.

Since then, pregnant women have traveled to Sandpoint or Missoula for pre-natal care and delivering babies.

Sometimes they forego needed prenatal care, because of the long and occasionally dangerous drive required, Eggensperger said. And the hospital has handled some births in its emergency room, when pregnancies come to term unexpectedly.

In 1992, the hospital was acquired by St. Patrick Hospital and Missoula Community Medical Center in Missoula, who operate it jointly. Subsequently, the hospital attracted three board-certified family practice physicians. With only one or two OB physicians, it is difficult to offer OB services, because a doctor must be on call at all times. With three doctors, it is feasible to share these on-call duties, said Tom Mitchell, hospital administrator.

The other factor allowing the service to resume a significant decline in the cost of malpractice insurance. Mitchell said he did not know if it was a national trend.

"But the way it results for us, it's now more feasible (to offer OB) than in 1986," he said.

The hospital will only do low-risk deliveries.

"If a patient is identified as being high-risk, we'll refer to Missoula," he said.

Although the hospital is a nonprofit entity, and contributions are tax deductible, it does not have taxing authority, so it cannot seek a mill levy to help pay for the needed equipment, he said.

Immediate needs include about $51,000 worth of equipment to outfit the birthing room and nursery. Another $71,000 is needed for a second anesthesia machine, portable ultrasound unit and a fetal monitor. The hospital is licensed for 16 acute care beds and 28 long-term care beds, and operates clinics in Thompson Falls, Hot Springs and Plains.

It is too much to expect the hospitals in Missoula to subsidize such an expensive service for Sanders County residents, although the Missoula hospitals do provide training and support for doctors and nurses, Mitchell said. The hospital's financial analysis indicates that a volume of 50-60 babies a year will make the OB services self-supporting, once it is up and running.

"But we will not be able to generate the up-front cost of the equipment necessary to allow us to implement the service," the hospital board said in a fact sheet. Thirty-five percent of the babies born to Sanders County residents are covered by Medicaid, which does not pay physicians or the hospital an amount adequate to properly fund the service, the fact sheet said.

The initial investment to outfit the OB service poses the dilemma, the board said, and OB services should then be self-supporting.

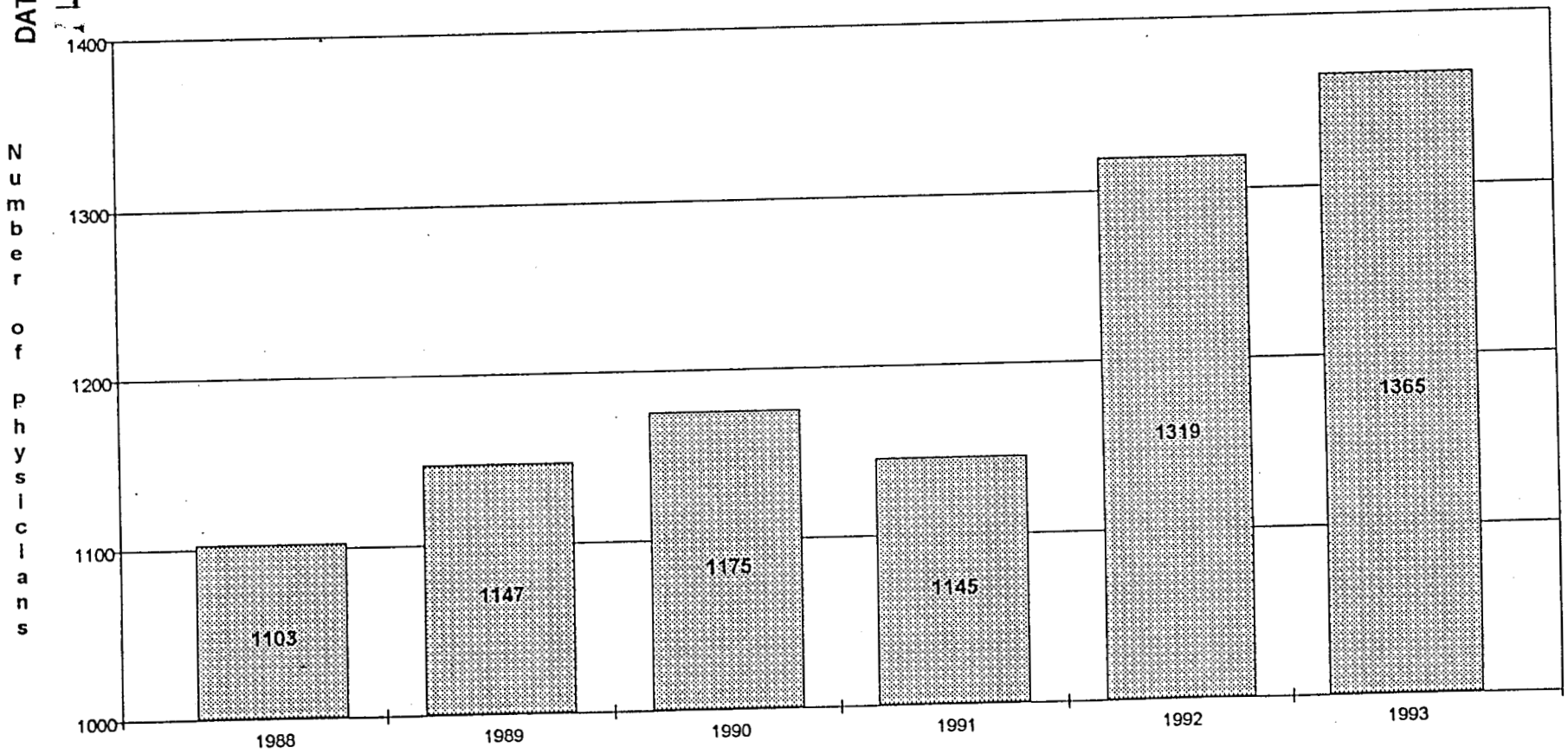
"It's 100 miles from here (Thompson Falls) to Missoula, and 85 miles to Sandpoint. If you have to drive down an icy highway while you're almost ready to give birth, it's a frightening experience," Eggensperger said.

She speaks from experience. She drove to Sandpoint in 1987 to give birth to one of her children.

Missoulian, February 22, 1995

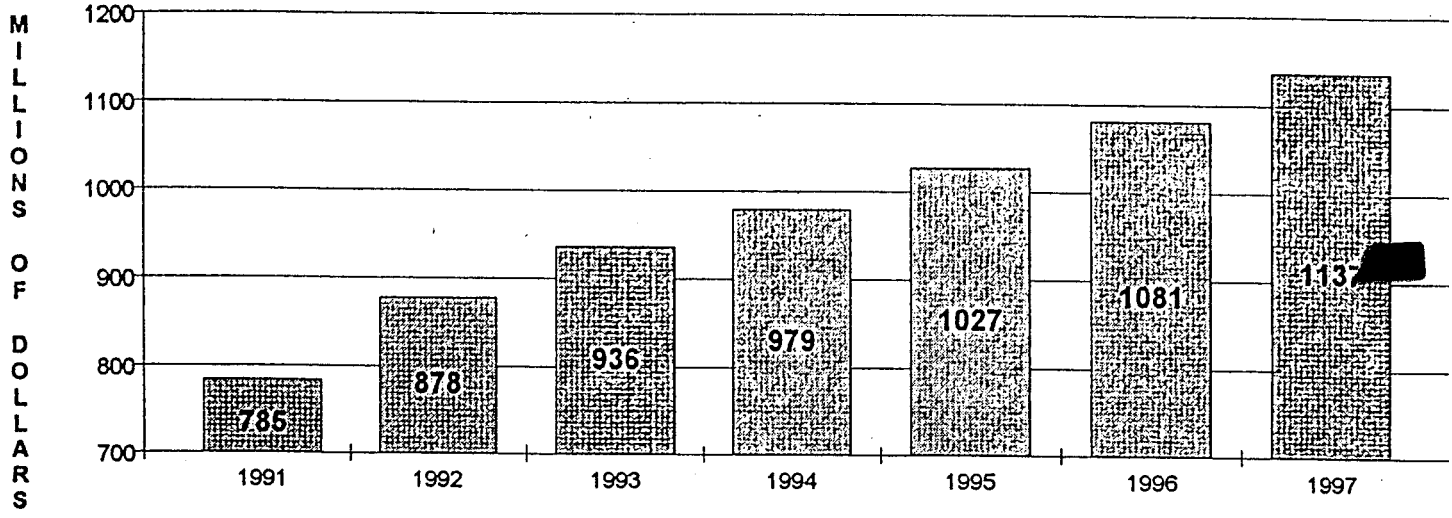
EXHIBIT 7
DATE 3-21-95
HB 309

ACTIVE MONTANA PHYSICIANS, 1988-1993



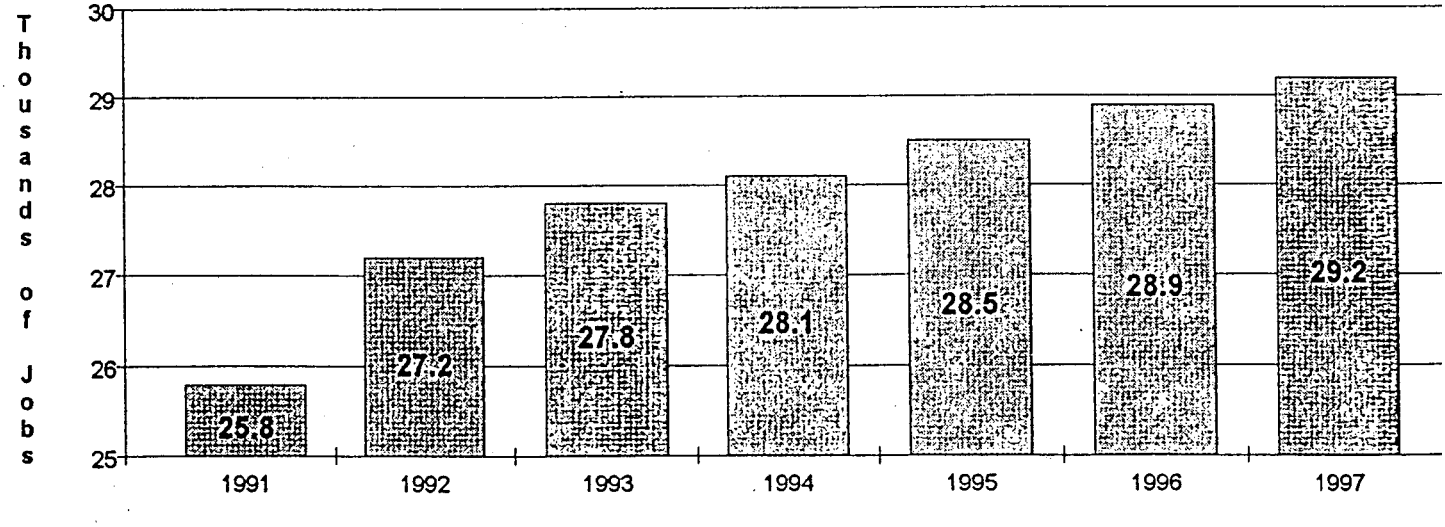
Based on assessments reported by the Montana Medical-Legal Panel

Montana Health-Services Personal Income, 1991-1997 (Actual/Projected)



Source: Bureau of Business & Economic Research, Univ. of Montana (Dec. 1994)

Montana Health-Services Employment, 1991-1997 (Actual and Projected)



Source: Bureau of Business & Economic Research, Univ. of Montana (Dec. 1994)

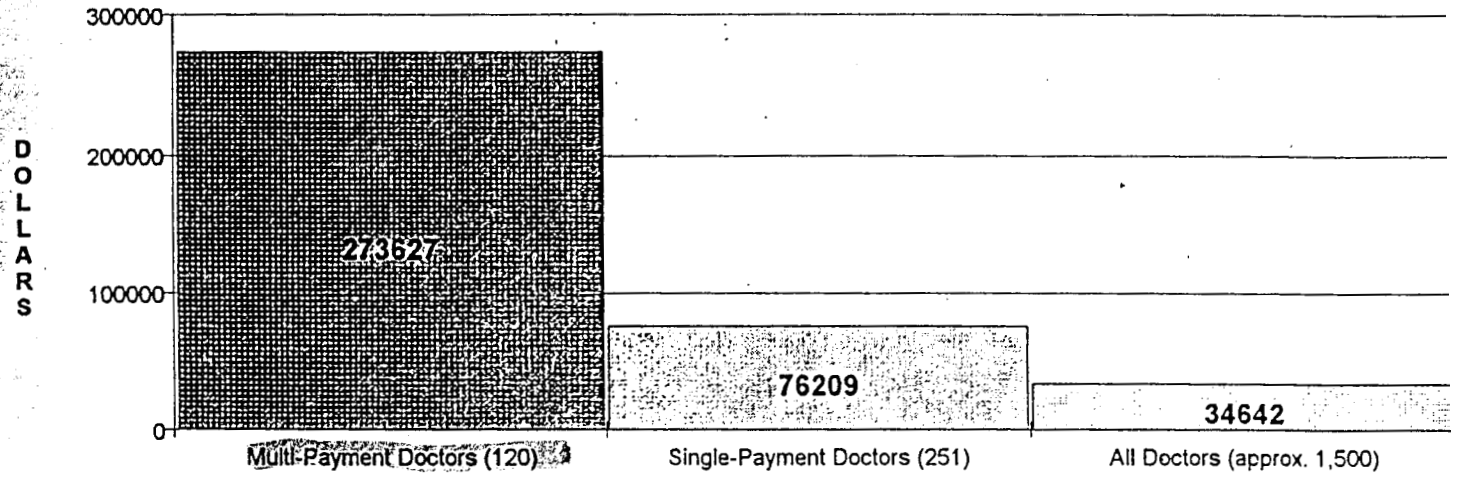
Medical Malpractice Claims Data, 1984-1994

Based on Reports to Montana Board of Medical Examiners

- Total Number of Claims Reported to MBME: 2315
- Total Number of Claims Resolved: 1961
- Total Number of Claims Resolved with No Payment: 1382 (70.5% of resolutions)
- Total Number of Claims Paid: 579 (29.5% of resolutions)
- Total Amount of Claims Payments: $51,964,013
- Total Number of Doctors Paying Claims: 371 (25% of total*)
- Total Number of Doctors Paying Multiple Claims: 120 (8% of total*)
- Total Number of Payments by Doctors Paying Multiple Claims: 333 (58% of total*)
- Total Amount Paid by Doctors Paying Multiple Claims: $32,835,313 (63% of total)

** Because of difficulty in calculating the total number of different, individual physicians practicing in Montana during the period 1984-1994, these percentages are conservatively based upon a total number of 1,500 (the Montana Medical-Legal Panel assessed 1,365 active Montana physicians in 1993).*

Total Payout Per Montana Physician, 1984-1994



Source: Montana Board of Medical Examiners

Montana Medical Malpractice Payments ($ Millions), 1984-1994

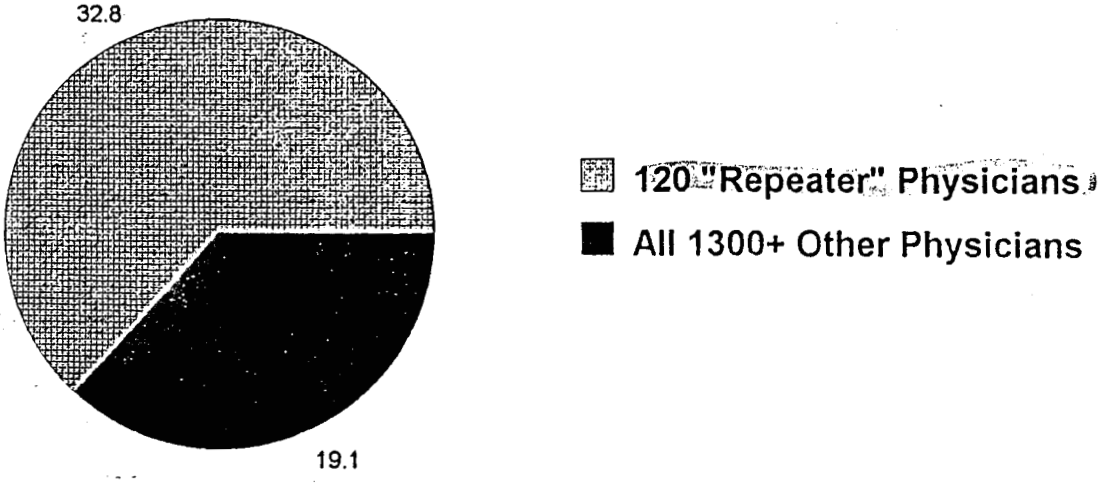
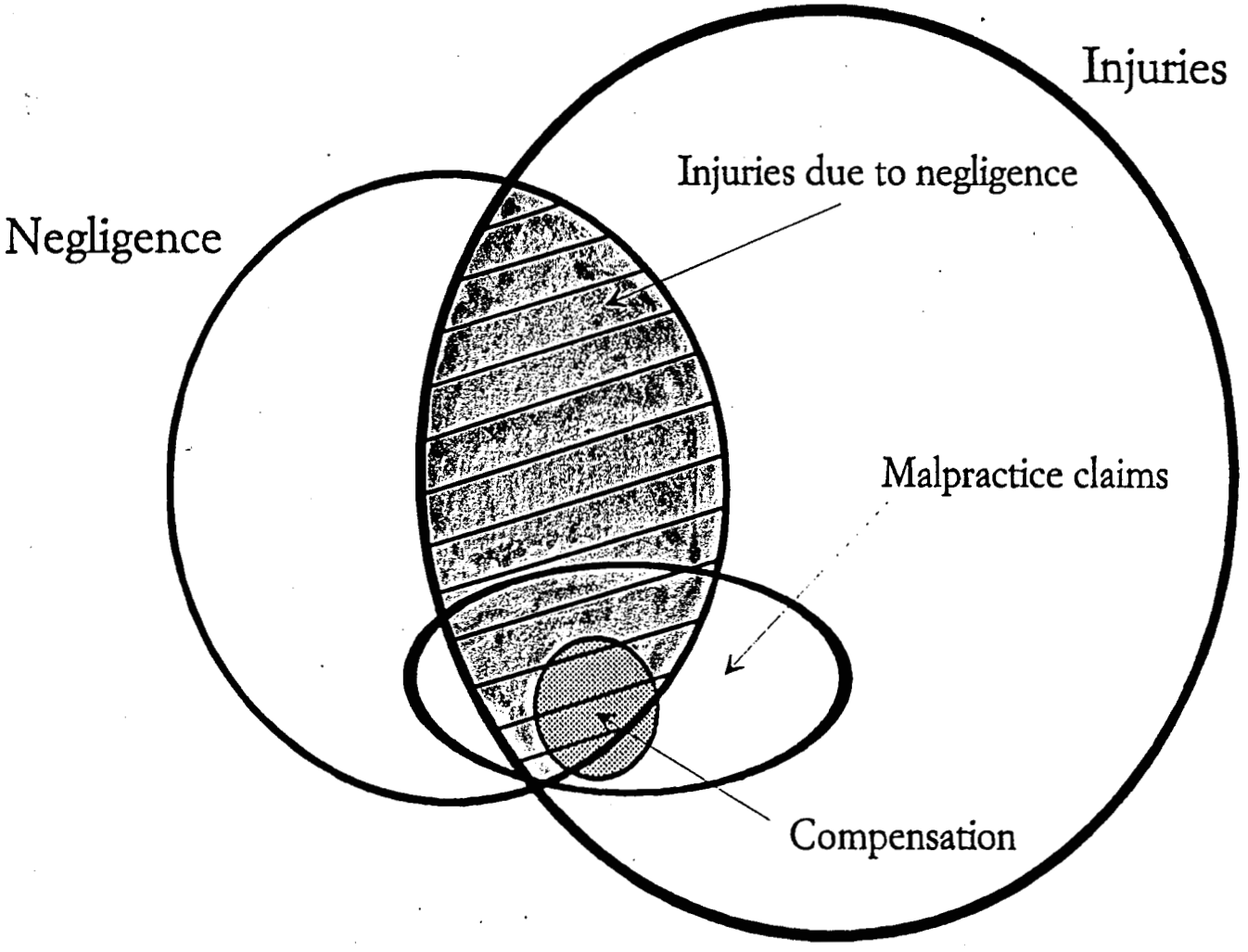


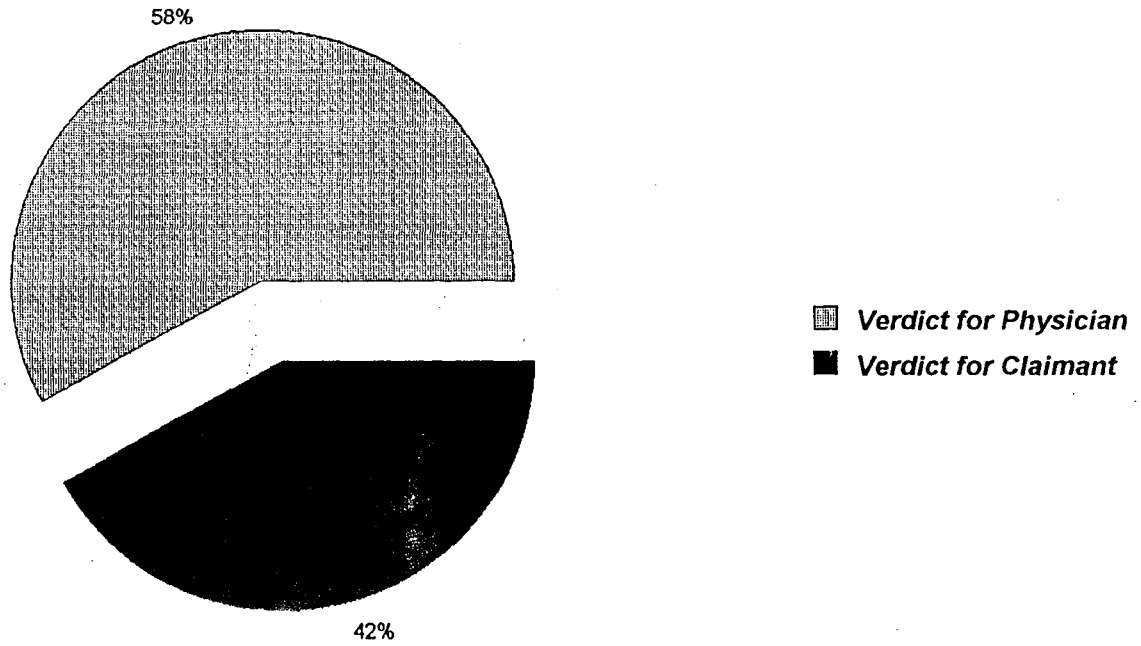
EXHIBIT 7
DATE 3-21-95
HB 309

Figure 1-1--Medical Injuries, Negligent Conduct and Malpractice Claims



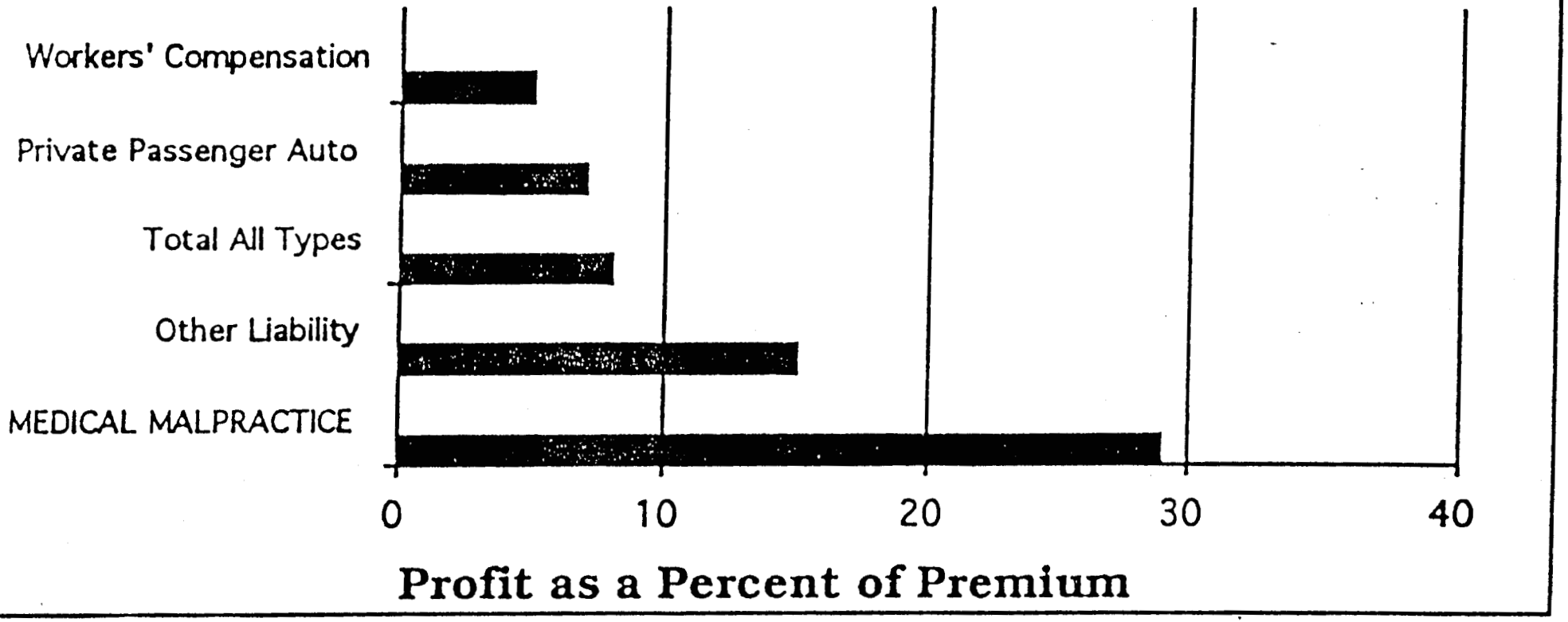
U.S. Congress, Office of Technology Assessment,
"Impact of Legal Reforms on Medical Malpractice Costs,"
OTA-BP-H-119 (Washington, D.C.: U.S. Government Printing Office, October 1993).

EVEN WHEN PHYSICIAN CONDUCT IS INDEFENSIBLE . . .



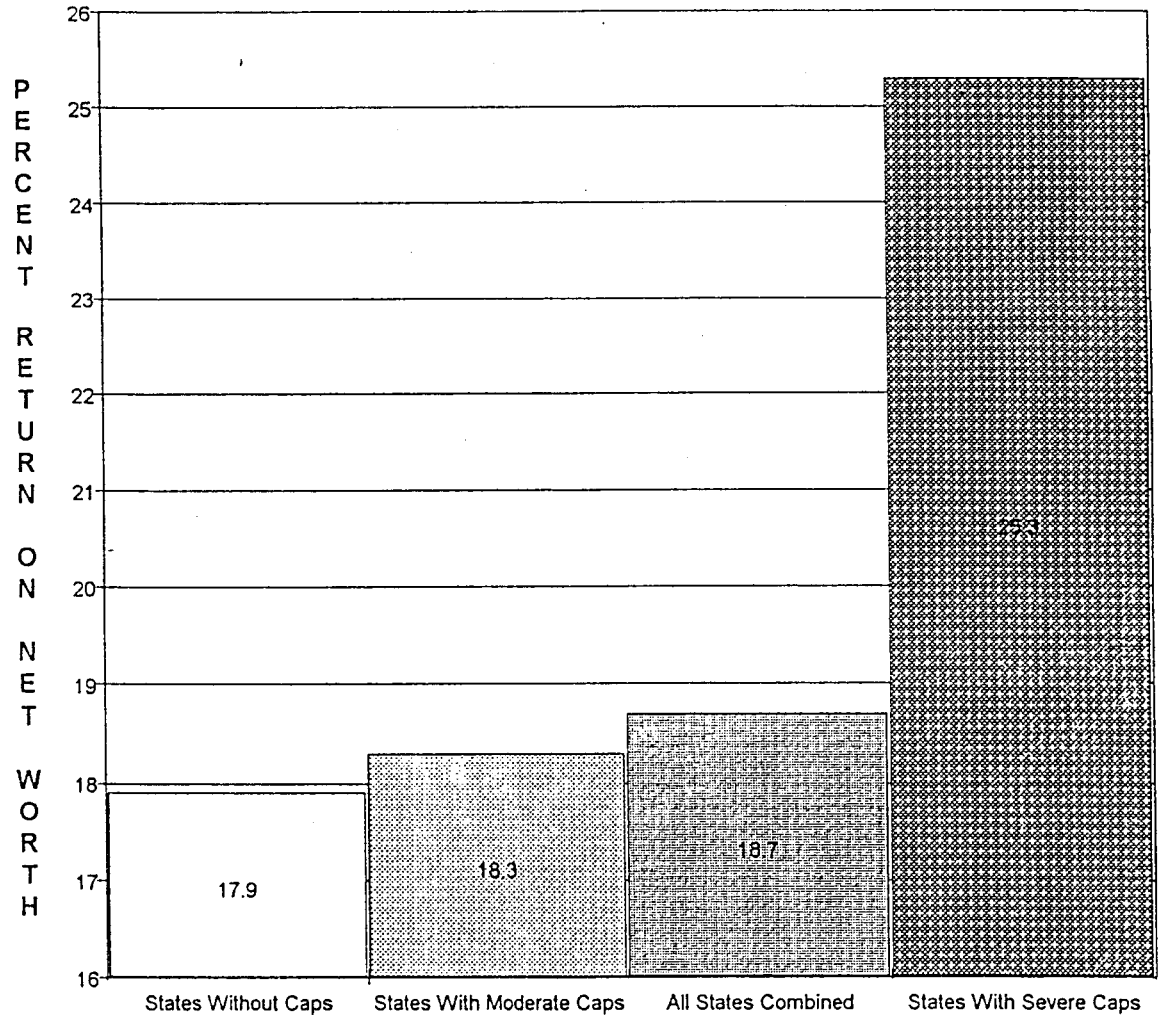
Findings based on a survey of 8,231 closed medical negligence claims involving 12,829 physicians insured by The New Jersey Medical Insurance Exchange from 1977 to 1992. According to the insurer's own internal evaluations, approximately 25 percent of those claims involved "indefensible" physician care, with physicians admitting liability in almost half of those cases. Yet whenever those "indefensible" cases went to a court verdict, physicians usually won. Results published in the November 1992 issue of *Annals of Internal Medicine,* Vol. 117, No. 9, and copyrighted by the American College of Physicians, 1992.

1991 INSURER PROFITABILITY BY TYPE OF INSURANCE IN THE UNITED STATES



-National Association of Insurance Commissioners Report on Profitability By Line By State 1991 (1992).

IF DAMAGE CAPS REDUCE RISK, THEN WHY DO THEY INFLATE PROFITS?



A fundamental financial principle correlates risk with profitability: higher levels of risk demand higher expectations of return; conversely, lower risk should be accompanied by lower expected return. If, as proponents insist, damage caps reduce the risk and cost of writing medical liability insurance, then liability insurers in states which cap medical malpractice awards should exhibit lower rates of profitability. But according to figures compiled by the National Association of Insurance Commissioners, the *opposite* is true: the more severe damage caps are, the more profitable liability insurance companies are.

Ratios of after-tax earnings to net worth, reflecting the most commonly used measure of profitability, are based on the NAIC's "Report on Profitability By Line By State 1990." States with "severe" caps on total recovery include Colorado, Indiana, Nebraska, South Dakota, and Virginia; states with "moderate" caps of some type include California, Florida, Louisiana, Massachusetts, Missouri, Mississippi, New Mexico, Utah, West Virginia, and Wisconsin.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 3/21/95
BILL NO. HB 309

March 8, 1995

Senator Bruce Crippen
Senate Judiciary Committee
Rm. 325
State Capital
Helena, MT.
59620

Dear Senator Crippen:

I will regretfully not be able to testify on March 21, 1995, concerning HB 309. I therefore am setting forth my testimony in writing. I sincerely thank you for your consideration in this matter.

Jill Blunt

My name is Jill Sebring-Blunt. I am writing this in representation of my late husband Bradford Blunt. I would like to tell you about him... I feel it will bring us closer to the issue here at hand today.

His boyhood was filled with the love to run, whether on a track or on a football field. This love and ambition brought him a football scholarship to Colorado University. He then went to Princeton Theological Seminary, where he received his Masters of Divinity.

Brad's love of life, his ministry and running became interrupted by a dull aching pain in his right thigh; a pain for which Brad Sought medical help. Overtime the diagnosis would change as did the amount of pain masking drugs to help Brad get through the day. All of these changed diagnosis causing too much time to pass by.

The correct diagnosis was finally discovered by accident. Brad had cancer. Cancer that had gone untreated for too long. By this time he could only go up the stairs by dragging his right leg up with his hand.

In September of '92 I watched a nurse have Brad put on a gurney while he cried, because they were taking him to surgery where he would have his right leg and right buttocks removed. The series of misdiagnosis had now, we thought, had its full impact.

I have an excerpt from Brad's diary that he kept for over 17 years. It is a way I feel that I can bring part of him here to you. The part that contains his innermost private thoughts. They reflect his emotions of this surgery.

"As we entered St. Mary's Hospital on the tenth day of September I became frightened. Jill and I had been here several times before. Once to look around. Mostly to catch the shuttle to the Mayo Clinic. Now I was here for another event. One that I did not want to happen. We checked in at eleven a.m. The doctor had another surgery that morning. He called over at three p.m. to get me ready. John said a prayer. I got onto the other cart. As they rolled me out of the room, I waved at mom. She smiled. I began to cry out of shear fear. I knew I was about to die. I was not sure I would live. Jill was next to me and told me to go ahead and cry...when I woke up I did as I planned. I slowly reached down and laid my hand where my leg was. The numb feeling was horrible. It felt like they yanked the leg off instead of surgically removed it. I was mentally coping..." A month later Brad continues,..."As I walked through the house on my crutches I did not anticipate the overwhelming feelings that would rush out as I entered my office. I wasn't in two feet before I stopped to brace myself. The room was the same. All my memorabilia from football and business days. My books. Typewriter. I was overwhelmed again with who I was now and who I had been. My mind and lips repeated the words, 'My God what have they done to me!' I cried and turned away and cried some more. What have they done to me? That is the lasting question that I see on people's faces. That is the question today. I'm getting back to work as I thought I would. But, in the morning, briefly, sometimes for just a split second, a voice inside asks, 'What happened?" Then, I ask myself again, what have they done to me? Usually I don't cry now."

On Sept. 25th of 1993, I watched, our son and neighbors all watched and cried, as the coroner put Brad on a gurney and removed his body from our house. He was 45.

EXHIBIT 8
DATE 3-21-95
HB 309

What concerns me now; is putting a limit on settlement damages. Trying to put one figure to cover all cases; taking away the respect each case and life deserves. Your own life, your mother, daughter, sons, or fathers life would deserve more respect than that. When you place a cap on damages of any kind, we are the very people that need it the most. You cannot be at each case anymore than you can make one monetary figure to fit all people and cases. Let each case be decided by the people and let the lawyers pick the jury. Take the responsibility off of yourselves and give it to the people.

This is not a story about financial euphoria. Brad is dead, our childrens father that used to kiss them goodnight and always read them a story is now remembered by them at bedtime in their prayers, when they say "I hope Daddy has a good nights sleep up in heaven."

Medical malpractice can happen to anyone, there's no rhyme or reason to it. Often times it will be a very quiet deadly mistake in a sunny doctors office. Don't by your own hand take away the right for an individual settlement; by doing so you are only offering one umbrella to cover thousands of people. Leaving so many of your voters out in the cold. I sincerely doubt the people left out in the cold will give up their need to be heard.

I would like to close with an excerpt from Brad's diary, he wrote; "Two sides of the Mayo Clinic Building have art on them. One side has a group of people in various stages of health. Some of them do not have all their body parts. On the other side there is a nude statue of a man reaching up with both arms, hands out. He is looking up with his head fully tilted back. The first time I saw it I noticed the nudity. Now, after my last Dr. visit, I saw that this was me. I was reaching for any help I could get."

We are now reaching out to you for help, because nothing seems to protect us from the mistakes, but you have the power to protect us from some of the financial devastation; the impact of medical malpractice.

Thankyou for your time.

Sincerely,

Jill Blunt

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 3/21/95
BILL NO. HB 309

MONTANA MEDICAL ASSOCIATION

2021 Eleventh Avenue • Helena, Montana 59601-4890
Telephone (406)443-4000 or In-State 1-800-MMA-WATS (662-9287)
FAX (406)443-4042

March 21, 1995
Tuesday

TO: SENATOR BRUCE CRIPPEN, CHAIR, SENATE JUDICIARY COMMITTEE AND EACH COMMITTEE MEMBER

FROM: JOHN W. McMAHON, M.D., PRESIDENT-ELECT

It is a pleasure for me to be able to represent the Montana Medical Association testifying in support of House Bill 309; we believe this bill is vital to the interest of the citizens of Montana. We want to make it clearly known the Montana Medical Association believes that any actual loss a patient my have suffered from any medical misadventure should be compensated fully. We want our patients so injured to be made whole as much as possible.

We are currently seeing in Montana a significant loss of necessary patient services because of the cost of medical malpractice insurance. In Missoula, all but one of the practicing ophthalmologists are refusing to examine children with potential retinal injury from prematurity and possibly oxygen therapy because of the cost of their medical malpractice insurance. The number of instances in which such examinations are required are not frequent enough to pay for the increased cost of this insurance. These children are then, of necessity, obligated to be transferred as premature infants to a medical center where a physician who does this regularly is able to examine them.

The physicians in Missoula are perfectly capable from a quality standpoint to examine these children. However, some recent court cases and testimony associated with them have suggested that a physician has to examine at least one hundred of these infants per year just to keep current. This is absolutely not necessary; however, insurance companies have taken the position that the defense of physicians who do not regularly examine this volume of children will be quite costly.

It is common that any child who falls on the playground ends up with an ambulance ride to the hospital and upon arrival immediately receives x-rays of his skull and neck. These x-rays in 99% of the cases are not medically necessary. They are done to protect the physician from a liability standpoint. The fact is that even if a small skull fracture is found, it will not make any difference in how the patient is managed.

(over)

Many family practice physicians are no longer delivering babies in our small rural communities because they will have to pay an additional $15,000 per year in malpractice premiums. Obstetrics is the highest area of litigation in the medical malpractice field. Physicians are being held responsible in some jurisdictions for any adverse outcomes. Over 90% of these outcomes are the result of circumstances far beyond the control of the physician.

Many of our rural hospitals no longer have an obstetrical service. The one single factor that would decrease the cost of medical malpractice insurance in tort reform legislation is a cap on non-economic damages. This would allow the actuaries of insurance companies to predict the potential costs of litigation in setting up premium schedules on a more consistent basis.

We totally support payment of every single patient cost as a result of medical negligence. Our opposition is to the unpredictability of damages for non-economic losses. We believe the cap of $250,000 is appropriate as is mandatory periodic payment of future damages.

Thank you for the opportunity to testify in support of House Bill 309.

MONTANA MEDICAL ASSOCIATION

2021 Eleventh Avenue • Helena, Montana 59601-4890
Telephone (406)443-4000 or In-State 1-800-MMA-WATS (662-9287)
FAX (406)443-4042

March 21, 1995
Tuesday

TO: SENATOR BRUCE CRIPPEN, CHAIR
SENATE JUDICIARY COMMITTEE
and EACH COMMITTEE MEMBER

Dear Senators:

I am here to testify in support of House Bill 309. I am representing the vast majority of caring, compassionate Montana physicians who take care of you and your families' medical needs 24 hours a day, 7 days a week. We ask you to pass this important legislation.

I do not know of a single doctor who would knowingly or willingly harm his or her patient. When a patient is injured the physician feels devastated and even more so if it might have been prevented. The doctor would like to make his/her patient whole. The main reason doctors carry medical liability insurance is to take care of these patients fairly and reasonably. We feel unlimited awards for non-economic damages are unfair and at times unreasonable. We are not asking you to limit loss of income, payments for future medical expenses, etc. We are asking you to define the upper limits of an area that may be almost undefinable but certainly is tragic and highly emotional.

I believe this legislation benefits the vast majority of citizens in Montana because:

1. A cap lowers liability insurance premiums. In California there was a 51% reduction in premiums and in Colorado the reduction was 53%.

2. Services may be increased with lower liability premiums. The Governor's Health Task Force in October of 1992 found 42% of Montana doctors had given up practicing obstetrics, 22 counties and 14 hospitals have no obstetric services. In Missoula ophthalmologists have stopped examining premature infants for retinopathy because of the liability risk.

(over)

3. There is the area of "defensive medicine" where direct costs to patients occur because a physician is attempting to ward off a lawsuit. Do you want your doctor shying away from the complicated and sometimes dangerous procedure that might save you or a loved one's life or limb? I certainly do not. Some estimates of these costs are in the billions of dollars. A doctor I know has had 1 suit filed against him in 20 years of practice yet it went on for 2 years after a 6-0 vote for him at the Panel. The attorney was asking for $6,000,000. The threat of that suit influences how he practices - on the defensive.

Because of the complexity and variance of human biology and human behavior medical practice involves risks and the imperfections of our humanness. Perfection can never be the standard. We are not asking to be excused for our failings. We are asking that some fairness and reasonableness be legislated into this very difficult area of medical liability. Please pass House Bill 309 unamended for Montana's patients.

Sincerely,

John V. Hanson, M.D.
President

JVH:le

THE DOCTORS' COMPANY

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 3/21/95
BILL NO. HB 309

RECEIVED
STATE AUDITOR'S
FEB 9 4 14 PM '94
HELENA, MONT.

Via Certified Mail

February 3, 1994

Commissioner Mark O'Keefe
Commissioner of Insurance
Montana Department of Insurance
126 North Sanders
Helena, Montana 59604

RE: All Specialty Rate Filing
NAIC Number 831-34495

Dear Commissioner O'Keefe:

On behalf of The Doctors' Company, I hereby submit for your review and approval, our new All Specialty Rates. These new rates will replace the all specialty rates currently approved (2/3/92) and on file with the Department. The overall claims made rate change for the state is 17.7%, based on TDC's current distribution of doctors. We are also proposing an 11% rate increase to our Tail Coverage charge. Proper justification for said changes are included within this filing. We would like to request a May 1, 1994 effective date.

The following items complete this filing:

- Two copies of this letter
- One copy of the filing
- Check for $20.00 to cover any applicable filing fees
- A prepaid, self addressed envelope

If you have any questions or if I can be of any assistance please call me at 800/421-2368, my extension is 397. Thank You.

Sincerely,

Tim Dixon

Tim Dixon
Regulatory Compliance Analyst II

cc: Cheri Priddy
/enclosures

The original of this document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

185 Greenwood Rd.
P.O. Box 2900
Napa, CA 94558-0900
707 / 226-0100
800 / 421-2368

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 3/21/95
BILL NO. HB 309

PO Box 4553, Missoula, MT 59806-4553
(406) 721-7334 (406) 721-7016 fax

MEMORANDUM

DATE: March 17, 1995

TO: Senator Nelson
Senate Judiciary Committee

FROM: Gail Wheatley, P.T.
President, Montana Physical Therapy Association

RE: H.B. 309 - To limit non-economic damages in medical malpractice awards

The Montana Physical Therapy Association supports HB 309 which would cap non-economic damage in medical malpractice cases at $250,000. The Association believes this cap will make a significant impact on the cost of malpractice insurance for those providers whose rates have become astronomical.

Physical therapists commonly treat the same clients as physicians who may be involved in litigation. We support the inclusion of physical therapists in this language. Without it, we see the potential for an increase in physical therapist suits as clients seek the provider with the "deepest pocket" for awards. I do not believe it is the intention of the legislature to put physical therapists at risk by leaving them as the practitioners without this protection and thank you for including us in this important piece of health care reform legislation. We ask for your support on HB 309.

EXHIBIT NO. 12
DATE 3/21/95
BILL NO. HB 309

HB 309: Solution to a Non-existent Problem

In Montana, Civil Filings Are Down More Than Ten Percent

Civil case filings dropped in Montana both in 1992 and 1993. In 1993, 10.5% fewer civil cases were filed in our state courts than in 1991. In half of the districts, civil filings dropped both in 1992 and 1993. Montana Supreme Court Judicial Reports, 1991-93. ***This rate of decrease is five times greater than the national trend.*** State Court Caseload Statistics: Annual Report 1992, at 16-17, National Center for State Courts. In Montana's federal courts, fewer civil cases have been filed each year since 1991 and the number of pending civil cases has decreased more than 14%.

Only Five Percent of Montana's Civil Cases Are Tort Cases

In Montana, personal injury cases comprise only about 5% of the total number of cases filed each year. (Montana Supreme Court Statistics, years 1987 and later.) Most cases involve crime, domestic relations, debt collection, estates and probate.

In Montana, Defendants Win Nearly 60% of All Civil Trials

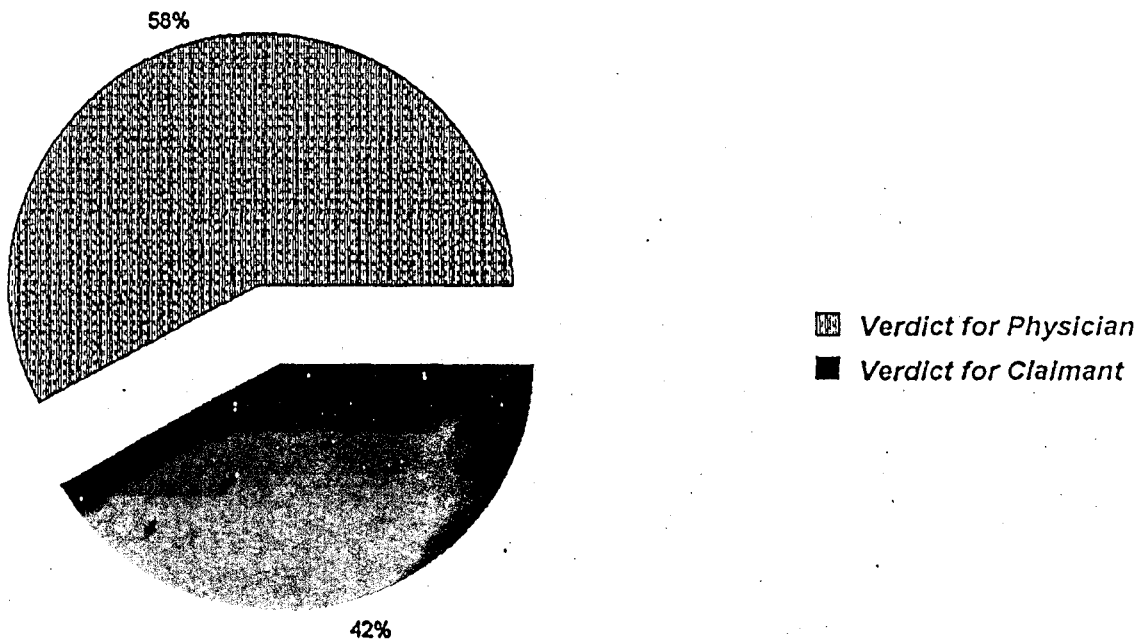
From January 1 through November, 30 1994, a total of 84 civil jury verdicts were reported from the state courts. Defendants won 48 of these verdicts (57%.) During the same period, 18 civil jury cases were tried in the Montana federal courts. Defendants won 10 of these (56%). (Data compiled from the Montana Law Week).

Montana's Doctors Win In Court Nearly 80% of the Time

Doctors won at trial in 15 of the 19 cases tried in Montana in the last ten years. (*That's right, according to the Montana Insurance Department and the Montana Legislative Counsel,* ***only 19 doctor negligence cases have been tried in all of Montana in the last ten years.)***

If It Ain't Broke, Don't Fix It!
Say No To More Government Interference
Vote No! on HB 309

EVEN WHEN PHYSICIAN CONDUCT IS INDEFENSIBLE . . .

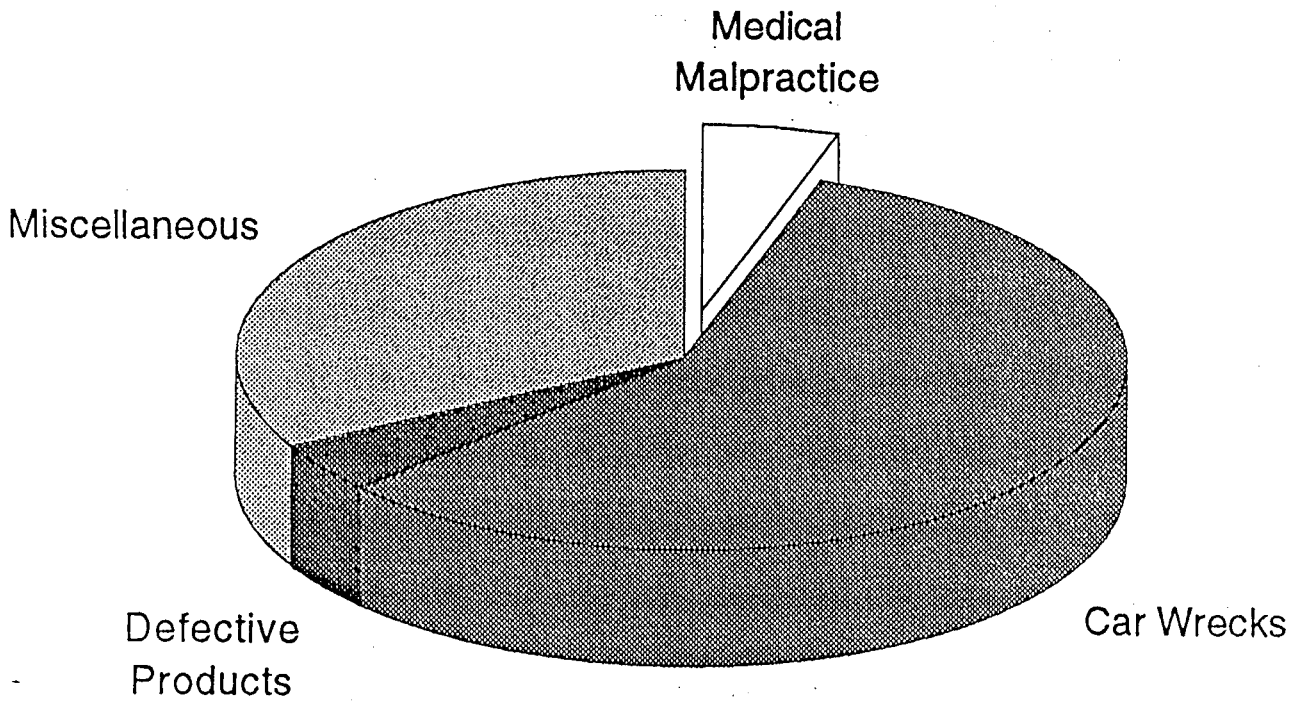


Findings based on a survey of 8,231 closed medical negligence claims involving 12,829 physicians insured by The New Jersey Medical Insurance Exchange from 1977 to 1992. According to the insurer's own internal evaluations, approximately 25 percent of those claims involved "indefensible" physician care, with physicians admitting liability in almost half of those cases. Yet whenever those "indefensible" cases went to a court verdict, physicians usually won. Results published in the November 1992 issue of *Annals of Internal Medicine*, Vol. 117, No. 9, and copyrighted by the American College of Physicians, 1992.

EXHIBIT 12
DATE 3-21-95
HB 309

Composition of Tort Filings

General Jurisdiction Courts (1991)



National Center for State Courts (1991)

HB 309: DAMAGE CAPS

Damage caps punish only the most severely injured Montanans, especially those who are paralyzed, brain-damaged, or otherwise incapacitated. The more severe the injury, the greater the likelihood that damage caps will leave these Montanans financially dependent upon society -- and burden Montana taxpayers.

Disfigurement, blindness, paralysis, loss of unborn children, loss of reproductive capacity or sexual function, destruction of the family unit and severe depression are just a few examples of non-economic damages. If an inept physician or careless hospital causes you, a member of your family or one of your constituents to live forever with such a loss, shouldn't compensation be paid by the guilty party? Each person and each case is different. The common sense of Montana citizen jurors are best able to hear the evidence and decide how much should be paid to compensate for the loss, based upon the particular evidence presented in the case. *You were elected because Montanans do not want the heavy hand of government taking control of their lives and their decisions.*

The Montana Medical Association, in its extensive 1988 reports on obstetrical care in Montana, concluded that a flat-dollar limit on damages is "misguided for a number of reasons. It doesn't work, is often held unconstitutional, and impacts more severely on the people who are injured the most." ("Who's Going to Deliver Your Baby: The Loss of Obstetrical Services in Montana -- Revised," June 1988, p. 19).

Wisconsin capped non-economic damages in medical-negligence cases at $1 million in 1985 and abandoned caps at the end of 1991 after six years of unsatisfactory results (*National Law Journal,* November 16, 1992, p. 37).

A 1991 report by Washington's insurance commissioner Richard Marquardt to that state's legislature denied that "tort reform" changes were responsible for stabilizing rates and increased availability of coverage. To the contrary, a 1989 law requiring insurers to consider investment income in setting rates was projected to have a much greater impact on insurance rates than changes in the tort system. ("A Study of the Effect of Tort Reform on Insurance Rates and Availability and Its Impact on the Civil Justice System," Report to the Washington State Legislature, January 1991).

EXHIBIT 12
DATE 3-21-95
HB 309

GAZETTE OPINION

Exception proves rule

Punitive damages rare in medical malpractice cases

REMEMBER WHEN Gary Hart was running for the presidency, and he dared the press to find any wrongdoing on his part — and the press did?

This session of the Legislature, the Montana Trial Lawyers Association challenged the public to find any evidence that punitive damages had been assessed in state medical malpractice cases — and the public did.

But the one exception proves the trial lawyers' rule: Punitive damages are almost non-existent in medical malpractice cases in Montana. What's more, in recent years, most insurance companies have dropped punitive damage coverage entirely.

So removing punitive damages will accomplish little in reducing medical malpractice insurance costs.

Perhaps the Legislature should look elsewhere for the culprit of climbing health-care costs, including the high administrative costs of private insurors, even though that's not nearly so easy, nor so popular, as blaming the health-care crisis on lawyers.

Tuesday, January 31, 1995

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 3/21/95
BILL NO. HB 309

TESTIMONY ON HOUSE BILL 309

My name is Fran Marceau, I am the State Legislative Director for the United Transportation Union. I am here today to speak in opposition to House Bill 309.

Under provisions of this bill, if a doctor or other medical provider is drunk or otherwise negligent and causes, for example, a person to be rendered paraplegic, his liability for non-economic damages would be limited to $250,000.00.

The bill also provides that, in an action for damages in excess of $100,000.00, the defendant may request the court to order that the judgment for future damages be paid in whole or in part by periodic payments rather than a lump sum payment. In many cases, the injuries to the members I represent are severe enough to prohibit them from ever returning to their jobs. Wise investment of a lump sum payment will guarantee a monthly income to a disabled person. With periodic payments they would not have that security.

The Federal Employers' Liability Act, and the general tort law in the state of Montana, have worked well for over one hundred years and should not be tampered with so as to remove economic benefits from victims of railroad negligence or medical malpractice.

I urge a <u>do not pass</u> recommendation for HB309.

Thank you for the opportunity to give testimony before this committee.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 3/21/95
BILL NO. HB309

Montana State AFL-CIO

Donald R. Judge
Executive Secretary

110 West 13th Street, P.O. Box 1176, Helena, Montana 59624 406-442-1708

TESTIMONY OF DARRELL HOLZER, COPE DIRECTOR, MONTANA STATE AFL-CIO ON HOUSE BILL 309, MEDICAL MALPRACTICE CAPS BEFORE THE SENATE JUDICIARY COMMITTEE MARCH 21, 1995

Mr. Chairman, members of the committee, for the record my name is Darrell Holzer of the Montana State AFL-CIO. I'm here today in opposition to House Bill 309.

Mr. Chairman, the idea of capping medical malpractice awards is enjoying a resurgence of political popularity, but it is by no means a new concept. The history of these kinds of laws is very enlightening for the discussion we're having here.

That history is very clear and very simple: the caps don't work. They don't reduce health-care costs, they don't reduce litigation, and they don't entice doctors to locate or remain in the states that have caps.

In Indiana, they've had 20 years of experience with a complete cap on malpractice awards, and it simply hasn't done what it's supporters said it would do. In fact, one of the most compelling stories **AGAINST** caps on damage awards comes out of Indiana and from one of the key lobbyists who helped pass that state's cap.

I've attached a copy of the report on this issue from the National Underwriter Company. In summary, Frank Cornelius was an insurance reform lobbyist who helped pass Indiana's $500,000 cap on damage awards. After the law passed, Mr. Cornelius was the victim of gross medical malpractice — repeatedly.

At the time he was lobbying for the cap, he was in relatively good health, had a vigorous work life and was walking around like you and me. After routine minor surgery for a knee problem, Mr. Cornelius was the victim of repeated snafus and egregious errors. He now is bound to a wheelchair, uses a respirator and is unable to work at all.

As an insurance specialist, he is well able to calculate what all of this has cost him to date and into the future. He estimates that his losses from medical costs and the lost ability to work are about $5 million. But his damage award was capped — as a result of his own work — at only one tenth of his losses: $500,000.

In recent weeks, our televisions and newspapers have brought us several outrageous examples of similarly horrible medical malpractice from around the country.

In Florida, a diabetic man went to the hospital to have a gangrenous foot removed in order to save his life. The surgeon took off the wrong foot. Because of the gangrene, he later had to have the infected foot removed, too. Who here would be willing to look that man in the eye and say his loss of mobility — of BOTH feet — is only worth $250,000.

At that same Florida hospital in the last few weeks, another patient got surgery on the wrong knee and a 77-year-old man died when a therapist disconnected his respirator — he allegedly was in the wrong bed, and the person assigned to that bed was scheduled to go off the respirator. Who here would say to that man's family that their loss is capped at $250,000?

Also in the last few weeks, a doctor mistook a woman's dialysis catheter for a feeding tube and ordered food pumped into it. The woman died as a result.

And just last week, the news was filled with reports of the Michigan mastectomy patient who came out of her surgery successfully, only to discover that the wrong breast had been removed.

The response from the medical community? In the future, let's use magic markers to write "NO" on organs and limbs that are **NOT** supposed to be operated on.

Mr. Chairman, the list of these atrocities could go on and on, and clearly, $250,000 is a paltry sum that doesn't even come close to compensating those people or their surviving family members for their losses.

The issue for these people is not runaway litigation — it's runaway malpractice. It's not that there are too many lawsuits — it's that there are too many victims of too much incompetence.

Indiana and California have caps that don't work. Insurance companies are telling the Legislature in Florida that a proposed cap there won't work. Here in Montana, we should take advantage of other states' history and experience by rejecting House Bill 309 and its bogus claims. We should focus our collective attention on fixing the problem of negligence, incompetence and malpractice, rather than setting up a litigation "bogeyman" to take the fall for skyrocketing health-care costs.

Attached to my testimony are several articles from various news sources about damage-award caps and medical malpractice, as well as a fact-sheet we produced about the issue. I hope the information is helpful to the committee, and I urge you to vote "No" on House Bill 309.

Thank you.

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The dark side of med mal reform: one man's story

(Medical malpractice; Frank Cornelius)

(Column) by David M. Katz (text via National Vidcotex Network) National Underwriter Property & Casualty-Risk & Benefits Management Nov 7 '94 p15 (2)
1995 National Underwriter Company

With the death of ambitious health care reform this year, the federal debate seems likely to shift to more modest proposals -- like medical malpractice reform, for instance.

Despite vigorous opposition by trial lawyers, the time seems ripe for med mal reform as a centerpiece of a more limited plan -- maybe not as modest as the Bush administration's, which offered only tort reform -- but modest nonetheless.

Med mal reform, after all, focuses on health care costs, a much easier flag to rally round than universal access. And there's bipartisan support for it in Congress, a rare thing to come by these days.

From President Clinton's point of view, the mere fact that curbing med mal liability at the federal level offers a way to actually do something on health care is a great temptation.

Further, the President and Hillary Rodham Clinton are unlikely to face insurance industry wrath if they propose such a program.

Insurers love liability caps because they make risks more predictable. Med mal reform also has great appeal for health care risk managers, for it allows them to manage their greatest exposure.

But before this becomes a no brainer, the politicians need to look very carefully at the dark side of med mal reform. For specifics, they should listen to the story of Frank Cornelius.

Mr. Cornelius, who has testified before Congress on health care reform, comes across as a man in pain. He is bound to a wheelchair, needs a respirator, isn't able to work.

The "continuous physical pain" in his legs and feet is curtailed only by morphine, Mr. Cornelius wrote in an op-ed piece in The New York Times last month. He has twice received last rites from his church, and his marriage is on the rocks.

He attributes most of his condition to medical malpractice and his struggles to pay for care to Indiana's med mal reforms. There are many other victims of medical malpractice and a very vocal opposition to reform. But what makes Frank Cornelius unique is that he's a former tort reformer himself.

In 1975, says Mr. Cornelius, a former lobbyist whose clients included the Insurance Institute of Indiana, he helped persuade the Indiana legislature to pass a med mal law capping damage awards at $500,000 and eliminating pain-and-suffering awards.

"Today, from my wheelchair, I rue that accomplishment," he writes.

Mr. Cornelius suffered a grotesque chain of mishaps by health care providers after he underwent routine arthroscopic surgery in 1989 for a knee injury caused by a fall.

The day after he left the hospital, he experienced a great deal of pain. The surgeon told his wife to get Mr. Cornelius a bed pan and then left on a skiing trip.

"He campaigns hard against (caps) — even though he doesn't expect to see the results of his efforts: He's been told he has less than two years to live."

Not surprisingly, Mr. Cornelius sought out another surgeon, who diagnosed his condition as "a degenerative nervous disorder brought on by trauma or infection, [which occurs] often during surgery," in the patient's words.

A short time later, because of a physical therapist's mistake in reading the instructions on a medical device, "I received a tremendous current of electricity through my left leg," Mr. Cornelius writes.

In 1990, with his condition already seriously complicated, another doctor working on him used the wrong instrument, producing holes in the main vein running from Mr. Cornelius' legs to his heart.

"I would have bled to death in my room if my wife had not come to see me that evening and called for help," he says.

And then he goes on: "As another physician tried to save my life, he punctured my left lung."

Mr. Cornelius, 49, records no further provider mishaps. His medical costs and lost wages, projected to retirement age, amount to over $5 million, he says.

But his claims against the original hospital and the physical therapist were settled for $500,000, which was the cap on damages for a single malpractice incident at the time of the settlement.

Because the Indiana Legislature has since raised the cap to $750,000, he may be able to collect some more money in a separate malpractice suit involving the 1990 incident. But the Indiana medical review panel has yet to act on the claim.

"Meanwhile," he told a House Energy and Commerce subcommittee last year, "Medicare pays little or Nothing."

In his argument against med mal reform in the Times, Mr. Cornelius asserts that "the damage cap has done nothing to curb health care spending...." His main point is that the cost of med mal lawsuits are only a tiny piece of medical spending, and he notes that doctors have not flocked to his state because of a lack of litigation or lower med mal premiums.

Theorists advocating med mal reform, of course, argue that its virtues go beyond curbing lawsuit costs. They point to its negative incentives on the use of "defensive medicine" and on excessive spending on medical technology.

But Mr. Cornelius' personal experience of medical malpractice and his bitter knowledge of the reform effort should make theorists pause. Here, after all, was a man who believed in reform at least enough to lobby for it.

Now he must strain to provide for his own care and livelihood because of deprivations he sees as having been inflicted upon him by those very same reforms.

So he campaigns hard against them — even though he doesn't expect to see the results of his efforts: He's been told he has less than two years to live.

EXH 14 3-21-95 HB 309

Damage caps ADD to pain & suffering

By Larry S. Stewart il v10 Insight on the News Nov 7 '94 p20(3) (text via National Videotex Network; emphasis added)

Washington Times Corporation

Liability claims have been blamed for everything from rising health care costs to hindering America's ability to compete in the global marketplace. As a result, advocates of legal reform argue that limiting damage awards will reduce costs and prompt insurers to lower premiums, particularly for doctors and product manufacturers. According to theory, any savings will be passed on to consumers by magnanimous insurers.

But these arguments are either naive or disingenuous. Damage caps, which limit an injured consumer's award to a predetermined amount, are arbitrary and capricious. Unlike a jury, which can weigh facts and tailor an appropriate award, a cap blindly applies regardless of the nature and severity of the injured party's pain and suffering.

If a 62-year-old insurance agent must rely on dialysis for the rest of his life because doctors removed his healthy kidney instead of the diseased one, is it fair that his jury award is slashed by California's $250,000 cap?

Is it fair to reduce the jury award to a limit of $430,000 for an 8-year-old Missouri girl who sustains brain damage and blindness as a result of her doctor's negligence during surgery?

Is it fair to reduce an award of $1.2 million to $500,000 for the survivors of a 50-year-old pipe fitter who died as a result of a doctor's misdiagnosis?

Such cases illustrate the insidious nature of damage caps. Juries, who hear all of the evidence and are in the best position to determine the seriousness of the damage to an injured consumer, are stripped of their role as evaluators of just compensation. Moreover, caps allow the wrongdoer to avoid responsibility for the harm he or she has caused (in law, a "tort"). Perhaps the cruelest irony is that the rationale for damage caps and some other tort "reforms" is unfounded by the facts.

Contrary to the assertions of some tort reformers, America is not awash in tort suits. According to the National Center for State Courts, a nonpartisan group in Williamsburg, Va., tort claims represented little more than 1 percent of the cases filed in state courts in 1992. Nearly 60 percent of all tort claims stemmed from automobile accidents, while only 7 percent were for medical malpractice and another 4 percent involved liability for defective products. During the last eight years, the center reported, tort claims have remained constant; since 1990 they actually have decreased.

These findings are not unique. The overall malpractice claims rate between 1985 and 1990 declined at an average annual rate of 8.9 percent, according to the American Medical Association publication Socioeconomic Characteristics of Medical Practice. Harvard University researchers, in a comprehensive study of malpractice in 1990, found that only one in eight negligently injured patients ever files a claim. "We do not now have a problem of too many claims; if anything, there are too few," the researchers concluded. Most studies of medical malpractice conclude that fewer than 10 percent of the claims that are filed are ever tried before a jury.

In contrast, litigation between businesses has exploded in recent years. The Wall Street Journal reported last December that contract disputes between businesses accounted for nearly half of all federal court cases filed between 1985 and 1991. "Businesses may be their own worst enemies when it comes to the so-called litigation explosion," the newspaper stated.

During the same period, litigation has had scant effect on America's global competitiveness. The business-backed Council on Competitiveness, a private, nonpartisan think tank, reported in September that the United States had "significantly strengthened" its position in a dozen important technologies and held a big lead in several others. And the 1994 World Competitiveness Report from the International Institute for Management and Development and the World Economic Forum recently ranked the United States as the world's most competitive economy.

The corporate proponents of damage caps, understandably, complain little when businesses vindicate their legal rights. Instead, it's the injured consumer who bears the brunt of their hostility.

Proponents of damage caps seemingly assume that juries, for all their democratic splendor, cannot be trusted. Juries, they claim, are out of control and make awards that have no connection to consumers' actual damage.

However, the General Accounting Office has found that the size of compensatory awards in product-liability cases varies by type and severity of injury in a manner that is consistent with the underlying economic loss. A 1989 GAO study concluded that compensatory awards were neither erratic nor excessive.

Further, the most comprehensive study of punitive damages in product-liability cases to date, by law professor Michael Rustad of Boston's Suffolk University, found only 355 such awards between 1965 and 1990. Nearly 25 percent of those punitive awards were in asbestos-related cases. Another 25 percent were reversed or remanded on appeal.

Moreover, the evidence shows that juries are not biased against doctors and awards are not unjustified. For example, a 1992 group study headed by Mark Taragin of New Jersey's Robert Wood Johnson Medical School and published in the Annals of Internal Medicine found that awards generally are consistent with severity of injury. "Our findings suggest that unjustified payments are probably uncommon," the authors concluded.

Possibly the most compelling evidence against damage caps is the states' own experience with this anticonsumer measure in malpractice cases.

In 1975, Indiana sought to control health care costs by enacting a total cap on damages in malpractice cases. Interestingly, Otis Bowen, the governor who signed the law into effect, was a physician. Under this cap, injured consumers could recover no more than $500,000 (subsequently amended to $750,000) for noneconomic damages such as pain and suffering and economic damages such as medical expenses. Nonetheless, between 1980 and 1990, Indiana's health care spending increased 139.4 percent, according to the health care consulting firm Lewin/VHI. This increase was higher than the national average of 138.7 percent.

(Continued on next page...)

Damage caps ADD to pain and suffering

(Continued from previous page...)

Ironically, one of the insurance company lobbyists who worked for the passage of Indiana's damage cap switched sides when he became a malpractice victim himself. Frank Cornelius underwent knee surgery in 1989. He argues that a series of botched medical procedures since then will end up costing him $5 million over the course of his life.

Another canard is that damage caps entice doctors to remain in the state because of supposedly lower insurance premiums. Indiana, however, had 45 fewer physicians per 100,000 residents than the national average, according to the 1991 Statistical Abstract of the United States. The Indiana Medical Association says that half of the graduates of the Indiana University School of Medicine leave the state upon graduation.

California's experience with a damage cap is similar to Indiana's. In 1975, California enacted the Medical Injury Compensation Reform Act, which limited noneconomic damages to $250,000. The law also imposed a short statute of limitations and allowed health care providers to require patients to waive their right to a jury trial in the event of malpractice.

These changes, however, have failed to contain California's health care costs, which rose 143.9 percent between 1980 and 1990. A 1986 GAO study found that malpractice premiums for doctors in Southern California increased from 16 percent for general practitioners to 337 percent for radiologists between 1980 and 1986.

In contrast to Indiana and California, the District of Columbia has not enacted any major changes to its medical liability laws. Nevertheless, the per capita increase in health care spending in the district between 1980 and 1990 was 108.4 percent, far below the national average increase.

That caps have not cut health care costs is abundantly clear for three reasons. First, medical malpractice litigation plays no appreciable role in health care costs. In fact, malpractice-insurance premiums account for less than 1 percent of total health costs, the Congressional Budget Office reported in 1992.

The National Association of Insurance Commissioners, or NAIC, and the A.M. Best Co., which monitors the insurance industry, report that in 1991 malpractice premiums accounted for about 64 cents out of every $100 of national health care expenditures. In everyday terms, that amounts to only 26 cents out of a $40 office visit. (By comparison, product-liability insurance premiums in 1991 accounted for 14 cents out of every $100 of product retail sales, according to the National Insurance Consumer Organization.)

Even though malpractice-insurance premiums constitute such a small share of costs, the NAIC reports that medical malpractice as a line of insurance had the highest profit as a percentage of premiums in 1991. Losses paid by insurers in 1991 for medical negligence amounted to only 0.31 percent (or 31 cents out of every $100) of national health care costs.

Second, damage caps have failed to harness costs, since insurers do not automatically lower their premiums when a cap is enacted. In fact, insurers consistently have denied that changes to tort laws, including the adoption of damage caps, will result in lower malpractice premiums.

For instance, the St. Paul Cos. and Aetna Casualty and Surety Co. concluded that Florida's cap on noneconomic damages in addition to other restrictions on consumer rights would not result in savings. Robert Trunzo, a spokesman for the St. Paul Cos., explained: "Nowhere has it been proved that tort reform will affect our loss costs. Experience tells us that these reforms don't always have the intended effect."

Third, proponents of medical-liability reform charge that so-called "defensive medicine," physicians' practice of ordering unnecessary medical tests because of the fear of malpractice suits, drives up health care costs. The American Medical Association estimated in 1983 that unnecessary medical tests cost consumers between $15 billion and $40 billion a year. However, a January 1993 study by Lewin/VHI estimates that changing medical-liability laws could save little more than $7 billion a year in insurance premiums and more cost-effective medical testing.

But the myth of defensive medicine as the villain of the health care industry was exposed in a July study by Congress' Office of Technology Assessment. According to that office, most physicians who order aggressive diagnostic procedures do so because they believe they are medically indicated, not because of concerns about liability. Only a small percentage of diagnostic procedures — "certainly less than 8 percent" — is likely to be caused primarily by conscious concern about malpractice liability. Physicians also tend to overestimate the risk of being sued, the study concludes.

Given that medical liability accounts for such a minute portion of health care costs, it should surprise no one that damage caps have not lowered costs. On the other hand, as long as proponents of damage caps can focus attention on the nonexistent litigation explosion and defensive medicine, they can deflect attention from the real cost-drivers of medical liability: the incidence of malpractice itself and the practice of physicians referring patients to laboratories owned partly by the physicians themselves.

The Consumer Federation of America reported in 1991 that the growth in diagnostic services "is more likely to be driven by self-interested, economically motivated ordering of tests," including clinical laboratory tests, Pap smears, X-rays and other imaging services. The federation report found that doctors with a financial interest in a lab ordered 34 to 96 percent more tests; those labs' prices for individual tests were 2 to 38 percent higher and total bills were 26 to 125 percent more than for independent labs.

At least five recent studies published by the New England Journal of Medicine and the Journal of the American Medical Association show that self-referring doctors order testing more often than other doctors, and their costs were up to 7.5 times higher than when outside services were used. The medical industry has vehemently opposed measures eliminating or regulating self-referral, even though such measures would be far more effective in controlling costs than damage caps. State legislatures and Congress have begun to regulate such practices.

The elimination of medical negligence, however, is by far the most effective way to reduce liability costs. Unfortunately, malpractice in America occurs far too frequently. The 1992

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"Harvard Medical Practice Study" estimated that in hospitals in New York state in one year alone, there were 27,000 negligent adverse events, including nearly 7,000 deaths and 900 cases of permanent disability. Extrapolating the study's findings to the entire country, researchers have estimated that medical negligence kills more than 80,000 Americans a year and injures hundreds of thousands more.

In response to this threat to public health, the medical industry — through damage caps and other "reforms" — has sought to make it harder for injured consumers to receive adequate and just compensation for their injuries. At the same time, the medical industry has shown that it is incapable of policing itself. In 1991, less than 1 percent of the nation's 615,000 physicians were disciplined by state medical boards. Only about 200 doctors lose their licenses each year, and many of those who do have committed fraud or felonies.

In the absence of appropriate oversight, it has fallen upon America's civil justice system to deter negligent and reckless conduct. For more than 200 years, American juries made up of citizens drawn from the community have attempted to mete out justice in a fair and evenhanded manner, regardless of the parties' wealth or social standing. Their efforts have strengthened America and created consumer protections that are second to none.

The proponents of damage caps seek to undo these advances. With facts and fortitude, injured consumers will prevail and — through the justice system — will create a safer, healthier America.

EXHIBIT 14
DATE 3-21-95
HB 309

MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on March 23, 1995, at 9 A.M.

ROLL CALL

Members Present:
Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	None.
Executive Action:	HB 309, HB 256
	HB 345, HB 443 - Discussion only.

{Tape: 1; Side: A; Approx. Counter: 00}

EXECUTIVE ACTION ON HB 309

Discussion: **CHAIRMAN BRUCE D. CRIPPEN** asked the committee to discuss periodic payments in relation to HB 309.

Motion: **SENATOR MIKE HALLIGAN MOVED AMENDMENTS # 3, # 4, and # 5 of hb030902.avl as contained in (EXHIBIT 1).**

Discussion: **SENATOR HALLIGAN** said these amendments would strike the periodic payment sections of the bill. The key issue for the

insurance companies, he said, is the cap. Page 3 and Section 3 both addressed periodic payments. Section 3 deals with any claim and they had no testimony on that, he said. He represented a case in which a child lost an arm to a wolf dog. He went to an insurance person to put together an annuity to help pay for the lifetime prosthesis and other items. If they would allow an insurance company to go out and find just any annuity, they would run into the situation where someone would go bankrupt. As guardian *ad litem,* he had the fiduciary responsibility to find the best insurance counselor he knew and trusted. He had not seen any justification for requiring periodic payments for all claims or for the medical malpractice. **SENATOR RIC HOLDEN** asked about the concept of bankruptcy. He thought bankruptcy and the reinsurance were the least of their concerns in restructuring their claims. **SENATOR HALLIGAN** asked him to call the insurance commissioner's office to see what kinds of problems they had on an annual basis with insurance companies with financial problems. He spoke of his case again, saying at least he had a hand in that process, whereas this bill would leave it up to the insurance companies. **CHAIRMAN CRIPPEN** asked what he would do with $500,000 as a guardian. **SENATOR HALLIGAN** said he would use the annuity option or stocks, bonds and investments. He would go to the D.A. Davidson Company, he said, to provide for the woman's lifetime. He would go to the insurance and ask what they would do, according to various payouts of 18 or 25, and the guarantee associated with each one of those. Or, he said, he would go to a bank and put it into a savings account. The **CHAIRMAN** said that he would be putting himself into the position of fiduciary, without the experience to do it. Also, he said annuities were made of exactly what he had referred to - stocks, bonds, real estate, CD's, etc. That is generally the investment portfolio of an insurance company. The difference is that a person might make a relatively small amount of money in a small pool. The major life insurance companies are registered in New York, with certain underwriting criteria. If they fell on hard times with some investments, and go into a receivership, they would probably still have enough reserves to handle their claims. He maintained that their investment pool would be much broader than the individual investor. He said periodic payments would be a better income program. Of the example of a $500,000 settlement, a person could maybe get the principal and get 5 per cent interest, based on a value of current earnings. Safety is the key issue, along with the flexibility of picking their own investment company. **SENATOR HALLIGAN** said to take the attorneys out of it. He used an example of someone with an injury with a $500,000 settlement. They may not know about reinsurance or be able to recognize a company with enough reserves to pay off their loans. Many times people would not have the sophistication to take care of it without an attorney. **SENATOR LARRY BAER** said he wasn't aware of how many "A" rated companies got into financial problems, but he thought it would be infrequent. It was his understanding that the components of the bill would not be against changing the term in the bill as A to A-plus to add more security to the prowess of the investment company. He believed

the many, on-hands approach of the bigger companies created far more securities and the preservation of the capital than one guardian or one conservator. An A-plus-plus company would only have an infinitesimal chance of mishandling the money. **SENATOR STEVE DOHERTY** said he was on the interim committee to address this situation. They looked carefully at periodic payments. He pointed to Page 3, and said already in statute is a law that says, "in any case in which the damage is greater than $100,000, a party can go to the court and request that periodic payments be made, if the party requesting can demonstrate to the court that it would be in the best interests of the person." The new Section 2 changes that. It says for a $500,000 medical malpractice claim, you HAVE to have periodic payments at anybody's request. He said it would invade the attorney-client privilege and/or usurp personal responsibility. It would assume the citizens of Montana are idiots that need the protection of the great hands of the state. The interim committee on a unanimous vote said they did not need to mandate periodic payments. They already had the demonstrated option. The value cannot be disputed, he said. In other cases, if person is given the money they deserve as the result of a jury case, and some of them have gone out and bought small businesses. Some he knew made a far greater return than they would have gotten from a mandated periodic payment program. Section 2 would change the presumption entirely around, and drop the minimum amount. It says the person is not in the best position to determine whether periodic payments are in their best interest. The insurance company is.
He said it would be government intrusion into the financial ability of Montanans to govern their own destiny. **SENATOR REINY JABS** stated that the idea of insurance was to protect the person, not to help them get established in business or some kind of a venture. **SENATOR DOHERTY** gave an example of a person receiving $100,000 for damages. Under Section 2, if the insurance company wanted to save some money, they would invoke periodic payments, whether or not the recipient wanted them. **SENATOR BAER** stated that **SENATOR DOHERTY** had stated they were covered under the law in Section 3, but they were going to consider the **HALLIGAN** amendments which propose to strike Sections 2 and 3. **SENATOR DOHERTY** explained that it would strike Section 3 from the bill, but not from the statute. Current law would remain in effect. **Valencia Lane** stated that the bill, as drafted, contained an amendment to 25-9-403. The **HALLIGAN** amendment would strike that section from the bill, which means there would be no amendment to that section. It does not repeal the section from existing law. **SENATOR LORENTS GROSFIELD** said if a person got the $500,000 over five or ten years, the bank would look favorably on a loan for the business they wanted to buy. In Subsection 2, Lines 8-10, he said the court "shall" but Subsection 2 says the court can structure the payments. He thought the court would listen to the parties, and he felt there was a lot of discretion in that section. **CHAIRMAN CRIPPEN** said his comments about the loan were appropriate, and the reason he was leaning toward mandatory periodic payments. He was concerned that the person would take

the lump sum to invest in a poor business, as 9 of 10 are. The person would then become a ward of someone, usually the state. **SENATOR SUE BARTLETT** said the logical conclusion to that argument is that it would be preferable to have the state impose its judgement rather than to rely on the individuals involved to better understand their self-interest. She asked if they wanted to protect these people from themselves in case they had a hare-brained idea to invest in a poor business prospect. She stated that these people would be very sensitive to their own concerns and did not feel that the state should intervene. She did not think the judge should usurp that person's own best judgement. **CHAIRMAN CRIPPEN** said he understood Section 2 to provide the court with the assistance, through all the parties, to fashion a settlement that would include periodic payments. If there would be substantiated need for a larger lump sum for medical purposes, for example, it could be granted. The court would have taken on the responsibility of taking care of the plaintiff, he said. **SENATOR BARTLETT** asked if the scenario he described could be done under current law without the changes? **CHAIRMAN CRIPPEN** said yes, but one would be mandatory, one permissive. He said he had come to the conclusion that mandatory would be best, knowing the temptations in business that he did. His concern was for the people that were permanently disfigured and/or injured with on-going medical problems. **SENATOR BARTLETT** asked if the same principle would apply to damages incurred from causes other than medical malpractice? The chairman said it only dealt with medical malpractice. For instance, he stated that a person at 50 years old would be in prime earning capability, and would thus need a larger amount of money immediately, and a lesser amount in the years thereafter. **SENATOR BARTLETT** asked if he would make it mandatory in all cases as well? **CHAIRMAN CRIPPEN** said probably, unless it was punitive, and there he was undecided. **SENATOR DOHERTY** said the conversation boiled down to a burden of proof shift. Under current law, if the insurance company didn't think a person was capable of managing, they would have to demonstrate to the court that periodic payments would be in that persons' best interest. If the amendments were not adopted, the burden of proof shifts to the injured person. This would be a person that had already been injured, already been adjudged to being a victim, already been adjudged to have suffered damages. They would now have to prove they were competent. **SENATOR HALLIGAN** stated that there was no proof of current abuses of the existing law, people investing unwisely in business, or abusing lump-sum payments. He maintained it was the plaintiff's money, not the insurance company's. If a person was 65, why would they want it structured over the next 10 years? Perhaps people would want to travel or enjoy their families.

Vote: The **MOTION BY SENATOR HALLIGAN TO AMEND HB 309 FAILED,** on a roll call vote of 4-7.

Discussion: **CHAIRMAN CRIPPEN** asked the committee to discuss caps.

Motion: **SENATOR HOLDEN MOVED TO AMEND HB 309 BY THE AMENDMENTS AS CONTAINED IN (EXHIBIT 2), HB030903.AVL, PREPARED AT THE REQUEST OF CHAIRMAN CRIPPEN.**

Discussion: **CHAIRMAN CRIPPEN** said he was convinced that a cap should be offered, the amount he was unsure of, but proposed $600,000. He felt $250,000 was not high enough for two reasons: 1) from testimony heard in the hearing, the average claims were far below. Ninety-six per cent of the medical malpractice cases were below that figure. He said they were non-economic claims such as pain, suffering and physical impairment. This may take away their ability to earn a wage, he said. 2) if the injury was so bad, physical disfigurement may prevent the person from holding any job at all. **SENATOR SHARON ESTRADA** agreed it was not enough. **SENATOR HOLDEN** asked **Mona Jamison, The Doctors' Company lobbyist,** about the four per cent of the cases that would be over $250,000. He asked about the realistic amount of claims over that amount. **Ms. Jamison** said there were between 8 and 11 individuals in Montana, in one year, to the best of her recollection. That would also cover the claims that were over $500,000, she said. **SENATOR HOLDEN** asked about the law of large numbers. In Montana, there are 800,000 people to be affected by this legislation. The premium difference between what most people carry now, which would be $1 million per person, $3 million per occurrence, would be increased somewhat. The purpose of the bill, he said, is to reduce the premiums. He reasoned that if they went with the amendment, nothing would be left of the bill in benefitting insurance customers. He argued that the savings for the 11 people would be paid by the other 800,000, so he could not support the cap. **SENATOR BARTLETT** asked if the 11 cases that exceeded $250,000, were the awards for non-economic only? **Ms. Jamison** said it was the total settlement, both economic and non-economic. When the cap is $600,000 as opposed to $250,000, the volatility of going up to $600,000 reduces the benefit of the bill, which was to lower the price of the premiums. The set cap would eliminate the incentive to go to court because the person could keep getting more. **SENATOR LINDA NELSON** quoted the chairman as saying the $250,000 would become a target. Was he now worried about the $600,000 becoming a target? **CHAIRMAN CRIPPEN** said he has posed that question to **Ms. Jamison** who replied that caps do not act as a target. In the hearing, he felt that separate caps would be necessary for each person in different causes of action in the accident. A husband, wife and children would be an example. **SENATOR ESTRADA** stated the different offered amendments were: $500,000, $600,000 and $1 million. They were trying to get the premiums down, however. If the figure is changed to anything else, would the premiums change? **Ms. Jamison** said the closer it is to $250,000, based on The Doctors' Company history, the bigger the deduction on the premiums for the physicians. $1.6 million would significantly cut into that benefit which is the decreased premiums. **SENATOR ESTRADA** asked about the $600,000 figure. **Ms. Jamison** said it would be minimal. The premiums would still come down somewhat, but very little over the years. That's why they were supportive

of the $250,000, she said. They could look to their particular experience in the states that had enacted $250,000, for example, California, had shown a 51 per cent reduction. Colorado had exhibited a 53 per cent reduction. OB/GYN rates would be reduced even greater. The further out the cap goes, the more benefits, she said. **CHAIRMAN CRIPPEN** asked if she followed that line, why not go a step further and not have any cause of action for non-economic damages? **Ms. Jamison** said they did not support that. She said the $250,000 is fair to the plaintiff and brings the greatest benefit toward the underlying purposes of the bill. **CHAIRMAN CRIPPEN** said in the free-market system the plaintiff's attorney may be able to argue for a $5 million settlement to a sympathetic jury. There would be many cases that would be worth more than $250,000. **Ms. Jamison** said, based on statistics, there were far more that are less than that, so the $250,000 ends up (for non-economic only) depriving very few people of what the potential is. She told the committee that a $600,000 cap really starts to cut into the benefits of the bill. **CHAIRMAN CRIPPEN** asked the value of a $600,000 claim at 8 per cent, over a 25-year period? **Ms. Jamison** asked them to remember they were only talking about non-economic damages. There is no cap on economics, she said. The medical and the wages are substantial and would not be affected by the cap. The initial large, lump sum could be structured to take care of immediate needs, attorney's fees and past medical and lost wages. **SENATOR DOHERTY** said he appreciated the offering of a $600,000 cap, but he thought it was too low. He said $1 million would be better. There is already a break on runaway non-economic damages awards. It's called a jury, or 12 Montanans, he said. The second break is the judge, if the jury goes crazy. The judge can order remittitur, to say it is too much, and as a matter of law, reduce the award. He said as a defense attorney, he would argue that everything is a non-economic loss. He maintained that the lower cap would mean loss of consortium claims in Montana. They should just flat out say the value of a husband/father is worth nothing if they are going to do that. Victims of low-paying jobs don't have an economic value, he said, such as ministers or stay-home moms. Those people don't have an earnings potential, so the insurance companies don't assess much value to their claims. The information they got from insurance commissioners point out that in the last 5 years, profits from malpractice range from 51 per cent to 10 per cent. That was a good range for public policy. **SENATOR JABS** asked about accidental death and if the children would be covered under the economic or non-economic portion? **Ms. Jamison** said the economic damage award received for lost wages and medical costs, still comes to the family.

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The first $250,000 would be split, to the wife and husband and some to the child. What causes the non-economic or non-quantifiable damages is related to the incident, and the $250,000 covers it all. She fully disagreed with respect to **SENATOR DOHERTY.** The profits he cited were national profits and don't

respect the loss ratio. For example, the Doctors' Company last year had a loss ratio of 102 per cent. She said the child could still get a non-economic award in a separate action that would not exceed the $250,000. **SENATOR JABS** asked if a family would get the potential earnings for the rest of a deceased man's life? **Ms. Jamison** said yes, particularly under the periodic payments program. If they are getting those payments, all of that goes to the heirs. **SENATOR HOLDEN** wanted to know how many death claims her company had last year due to medical malpractice? **Ms. Jamison** said she did not know for the company, but two were reported to the Board of Medical Examiners. The year before it was one, zero for the year before. Maximum would be three in any given year. **SENATOR HOLDEN** asked about how many consortium claims were handled? **Ms. Jamison** did not have that information available. **SENATOR HOLDEN** asked if the higher cap had to do with the consortium. **CHAIRMAN CRIPPEN** replied there were situations where the wife and child had more than one claim that would limited in a cause of action for the overall cap. **SENATOR HOLDEN** said that was his concern, because a loss of consortium claim was rarely experienced. To legislate for the few would not be a good practice. Death claims are few as well. He expressed a concern that if they put a $600,000 cap on at present, the chances of future legislatures reducing it would be minimal. If they went with the $250,000, two years from now they could increase it if claims experience should prove it too low. **SENATOR DOHERTY** answered **SENATOR JABS.** He stated that lost wages would not be covered. His point was that ministers did not make much money. So that a lost wage claim would not amount to much. The non-economic caps go to the kids for the worth of the father. If there were three claims, for the wife and two kids, it would reduce their value immediately for the loss of the father and husband. **SENATOR BARTLETT,** in response to the **SENATOR HOLDEN's** concern about the 800,000 Montanans, said that they were exposed to the risk of being among the 11 claimants at any given point in time. Caps would be significant to those 800,000 from that standpoint. **SENATOR NELSON** said they no longer paid their ministers in eggs and cheese. What dollar amount would be satisfactory? She asked if her needs were taken care of, would $250,000 make her happy if marred for life? She asked where the end would be, and where it would become a punishment? **SENATOR ESTRADA** said she had changed her mind, because the legislation was brought forth to reduce premiums, but these awards were for pain and suffering only. **SENATOR BAER** said they had heard for years about the escalating costs of medical care in our society. In conjunction with that, they heard people clamoring for tort reform in medical malpractice, which would reduce the cost of medical care. He argued that this was a significant tort reform bill. Apparently Congress felt that $250,000 was a feasible amount. If increased, the significantly effective bill would be an insignificant tort reform bill. It would impact the problem. **CHAIRMAN CRIPPEN** said then the only answer would be periodic payments in present value with future amounts. The capped rate of interest and the number of payments the insurance company has to part with would be less. They would have made a significant

step toward amending periodic payments. He could not see why there would not be a reduction in premiums with periodic premiums and no cap, much less $600.000.

Vote: The **MOTION FAILED** on a roll call vote of 4-7.

Discussion: There was a suggestion to discuss **SENATOR DOHERTY's** amendment capping the award at $1 million. He withdrew that amendment in favor of **SENATOR HALLIGAN's** amendment.

Motion: **SENATOR HALLIGAN MOVED THAT HB 309 BE AMENDED TO INCLUDE ITEM # 2 OF HB030902.AVL.**

Discussion: **SENATOR AL BISHOP** asked about negligence, not gross negligence, was that correct? **Ms. Jamison** said that was correct. In gross negligence cases where punitives are awarded, they are not capped. **CHAIRMAN CRIPPEN** asked about gross negligence? Would that qualify for punitive? **SENATOR BARTLETT** said there was no exception for gross negligence in this bill.

Vote: The **MOTION FAILED** on a roll call vote of 4-7.

Motion: **SENATOR DOHERTY MOVED TO AMEND HB 309 BY AMENDMENTS 2, 3 AND 4 OF hb030905.avl AS CONTAINED IN (EXHIBIT 3), withdrawing Item # 1.**

Discussion: He explained the second amendment would allow the cap on non-economic damages to be disclosed to the jury. The third would deal with grossly negligent malpractice claims, saying that this bill and the caps would not apply. The last amendment dealt with the fact that simply buying a court-approved annuity does not mean the judgement is satisfied. In every other case, a judgement is only satisfied when the amount is paid out in the terms of the court order. **CHAIRMAN CRIPPEN** re-stated the amendments. The first would say the $250,000 limits may be disclosed to a jury. It wouldn't be mandatory, though. The second amendment said the definition of malpractice does not include a claim of grossly negligent act or omission. He said it would be into punitives and the caps would apply. He stated that in the testimony of the hearing, there were very few cases of punitive damages in medical malpractice cases. How would this amendment change that, if at all? **Russell Hill, representing the Montana Trial Lawyers** said that the bill would not change awards for punitive damages. They are incredibly rare. He disagreed that gross negligence qualifies for punitive damages in Montana. **SENATOR HOLDEN** asked **SENATOR DOHERTY** if he wanted the jury to fully understand what the limit is? **SENATOR DOHERTY** replied, yes. **SENATOR HOLDEN** stated that the jury should concentrate on the damages of the person that was injured. They may be great or small, but at no time should they be influenced by the possible pot of money available to draw from. It would be important from the concept of fairness that each side try their case based on the merits of the claim. When dollar figures are interjected to a jury, he said, it dilutes their real attention to what has

occurred. It would not be fair to either side. He strongly opposed the amendment. **SENATOR DOHERTY** said the jury would have made a determination. Then afterwards, thinking it had done right, they would never know that the legislature had substituted its wisdom for their wisdom. They should be told the limit for non-economic damages. **SENATOR GROSFIELD** said everything would apply just as well if it were $1 million. He agreed with **SENATOR HOLDEN.** He did not want the jury to be driven by the thought that there is $250,000 and they should go after it. They should be driven by the problem. He said they should resist the amendment.

Vote: The **MOTION ON ITEM # 2 FAILED** 8-2 on an oral vote.

Motion: **SENATOR DOHERTY MOVED ITEM # 3 OF hb030905.avl.**

Discussion: **CHAIRMAN CRIPPEN** said he was basically taking out of the definition of medical malpractice that the cause of action would not have to be gross negligence or omission. He said he would not be putting that back into ordinary negligence. If the jury found gross negligence, they would be into punitive. **SENATOR HOLDEN** asked if it would be necessary? **CHAIRMAN CRIPPEN** said he would probably not vote for the amendment because it would lower the standard necessary to get punitives and also to get medical malpractice. **Mr. Hill** stated that neither the bill nor the amendment would do anything to punitive damages. The amendment would lower the threshold for application of the cap on non-economic damages to negligence. The cap would not apply to jury-found gross negligence. **Ms. Jamison** said if there was an omission, and it was negligence, the cap would not apply. So this ends up cutting into caps, so she urged failure of the amendment. She agreed with **Mr. Hill** that punitives are rare and they are not affected by this bill. **SENATOR DOHERTY** told the committee that the negligence standard, "failure to meet an acceptable standard of care," is recognized by professionals in the field where medical malpractice would not be affected. If there was negligence, all of the caps, and the non-economic caps and the periodic payments would come into play. That would be a significant victory for the insurance carriers. If a grossly negligent act would take place, the caps would not take place. The policy decision would be: if there is a mistake, by their actions in the committee they would be saying the injured party is not entitled to full compensation, but they would set the limits. But, if there was a really stupid act of negligence or omission, he thought the benefits ought not to kick in. **Jerry Loendorf, representing the Montana Medical Association,** said the adoption of the amendment may change every case to a gross negligence case. It would be an allegation of negligence and gross negligence to try to circumvent the cap. He predicted an adverse affect to the bill. **SENATOR BARTLETT** asked if in the past the juries were asked to differentiate between negligence and gross negligence? **Mr. Loendorf** said because now there is no need to prove gross negligence, there is no need to allege it

unless there is a reason to believe it may increase the damages.

Vote: The **MOTION FAILED** on a roll call vote of 3-8.

Motion: **SENATOR DOHERTY MOVED ITEM # 4 OF hb030905.avl.**

Discussion: He explained the amendment saying that after a jury has determined negligence, the simple purchase of an annuity does not discharge that individual who has already been found negligent of the judgement. The judgement, as in any other civil case, would only be discharged when the order of the court is met. **CHAIRMAN CRIPPEN** asked if it would be considered a contingent liability on a financial statement, or perhaps a real liability? He wondered if this would diminish the financial ability of the person and if it would fly in the face of bringing finality? **SENATOR DOHERTY** said that as opposed to someone who had been adjudged to doing something wrong, and someone with economic damages and future lost wages, between them would be a satisfaction of judgement. If they had periodic payments to not keep the judgement debtor on the hook, but to automatically give them a satisfaction of judgement would mean that should the debtor end up, "sucking air," they cannot go after the person that damaged them. **SENATOR HOLDEN** said the whole idea of a structured settlement is to pay your money, to structure settlement and be done. The amendment would not create finality, nor would it be tort reform, he said. **SENATOR DOHERTY** said if they wanted finality, they could pay the judgement right up front. Pay the $500,000 today and do not provide extra profits to the insurance company by allowing periodic payments. He stated that one person's version of tort reform and another person's attack on Montanans would be in the eye of the beholder. **SENATOR BARTLETT** pointed out that the other section of the law, which was future damages and non-malpractice claims, the language is permissive. It said the court, "may" order the judgement be satisfied or discharged. She said those claims for product liability or other action, do not have the kind of finality that was discussed. She didn't think they should provide the finality for this small group of individuals.

Vote: The **MOTION FAILED** on a roll call vote of 3-8.

Motion: **SENATOR GROSFIELD MOVED THE AMENDMENTS AS CONTAINED IN (EXHIBIT 4), hb030901.avl. He also provided a gray bill. (EXHIBIT 5).**

Discussion: **SENATOR GROSFIELD** said the amendments were in response to a discussion during the hearing which dealt with the language on Page 1, Line 18, the concept of the single incident. He explained that there were different answers on the questions. His understanding was the sponsors did not want to limit it to $250,000 per incident, but per each derivative injury. As long as there are different opinions, he wanted to clarify the concept before a judge was forced to do that for them, guess at their intent. He asked to change Item # 2 where it said, "all claims

deriving," it should say, "all claims for non-economic loss deriving." He also said Item # 10 should be changed, which was technical issue. The reference should have been Section 1, Lines 19-21, not 27-6-103. **SENATOR BAER** stated his hatred of ambiguity and felt the amendments would clarify some smokey areas and would remove a mine-field in the future. **SENATOR HOLDEN** supported the amendment and felt it would make it clear that each patient is subject to the $250,000. **Ms. Jamison** stated that her organization would totally support the amendments. She agreed that it would be a mine-field for litigation. She supported the idea that each person would have their own cause of action in a multiple-patient situation, and it would not be divided up. **Mr. Hill** agreed that the intent was not to apply a single cap to multiple patients directly affected by malpractice. He had not read the amendments, but agreed with the importance of them.

Vote: The **MOTION PASSED UNANIMOUSLY** on an oral vote.

Motion: **SENATOR HALLIGAN MOVED TO AMEND HB 309 AS PER THE AMENDMENTS CONTAINED IN (EXHIBIT 6), hb030904.avl.**

Discussion: **SENATOR HALLIGAN** explained that the first two amendments dealt with the same issue as the previous amendments already adopted. Item # 3 was a substitute item from Page 2, Line 26, the physical impairment or disfigurement inclusion into the non-economic loss. He said he would strike the subsection. He asked **Mr. Hill** to further define the amendment. **Mr. Hill** said the definition of non-economic loss on Page 2, defines as non-economic loss physical impairment or disfigurement. He said they were not talking about non-economic loss from those conditions. He thought it was a poorly worded provision, and not what the proponents intended. If the subsection were taken out, it would still exclude emotional distress and inconvenience, injury to reputation, loss of society, and others. It would not define as non-economic loss, physical impairment and disfigurement. He thought it was a good amendment. If the language stayed in there, there could be constructive legal arguments made that because physical impairment is in there, the bill could not mean what it says, because it says physical impairment is non-economic loss. **CHAIRMAN CRIPPEN** asked about the cap on it. **Mr. Hill** stated that if Line 26 were removed, and he wanted to demonstrate to the jury that there was non-economic loss which was subjective and non-monetary loss without a definite value, and more than $250,000, it would still be affected by the cap. Non-economic loss from physical impairment or disfigurement would be judged by the same standards as everything else, he said. The bill, as read, defined physical impairment as non-economic loss. He asked the committee to question the proponents about the semantic and legal definition of the phrase. **SENATOR HALLIGAN** wanted clarification. He asked if in the arguments on economic loss for physical disfigurement, they would be including lack of employment and employability because of scarring, which would eventually be included in the economic portions. **CHAIRMAN CRIPPEN** stated that they were included anyway. **Mr. Hill** said if

he were a plaintiff's attorney and the bill passed as it was, if he wanted to get more than $250,000 in non-economic losses, he would come in with the experts that can quantify what it's worth for the person to hunt, or fish. They could give "objective" information about what a non-economic loss would be. What the bill has to mean with Line 26 included, is that anything you can make objective and monetary is not going to be affected by the cap, because it defines physical impairment or disfigurement as a subjective non-monetary loss. If he had a physical impairment that had a economic component to it, the bill would denominate that as a non-economic loss. **SENATOR BAER** said he understood the concern that these things could be directly related to an economic loss in some instances. He thought they should make the distinction as impairment or disfigurement, not giving rise to economic loss. **Mr. Loendorf** said physical impairment by itself would not cause a loss of earnings. If a person would suffer a loss of wages, that would be recoverable. He said the example of a construction person having broken arm would cause loss of wages, as well as some impairment, as well as some pain. The pain and impairment are non-economic losses. The loss of wages is an economic loss. Their concern about disfigurement was that every surgery left a scar, so some disfigurement could be claimed. Workers' Compensation addressed that problem by awarding a low figure, $2,500 for severe disfigurement for the head, neck and face. The idea of the disfigurement, unless it is excluded, would be an item that opens the door in every surgery case. **SENATOR BARTLETT** asked **Jacqueline Lenmark, representing the American Insurance Association,** for her opinion on the limitations of non-economic recoveries in the bill on the subjective items discussed. How quantifiable are impairment and disfigurement, she asked? **Ms. Lenmark** said impairment is quantifiable. They had a method of assessing it to the proportion of the whole body. In terms of dollars, it also is quantifiable in this kind of an action. It would be lost wages or ability to earn related to the impairment. Disfigurement is a more difficult one to quantify. If she were a fashion model and her face was disfigured by a surgical procedure, a jury would have the ability to put a dollar amount on that disfigurement. A scar typically covered by clothing would be a more difficult determination to make. In the Workers' Compensation they arbitrarily put a dollar amount on it because they don't compensate for non-economic losses and don't require the proof of fault. **SENATOR BARTLETT** said given that information and the fact that they are quantifiable items in most circumstance, she did not think that it came within the bill's definition of non-economic loss as subjective non-monetary loss. She supported the amendment. **SENATOR BAER** said he understood the concern and solicited modification of Item # 3 rather than strike Subsection (iv) in its entirety, by including language of non-economic or non-monetary loss. **SENATOR HALLIGAN** said because he did not practice in the area, he did not know how to draw the line in actuality to damages.

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Mr. Lendorf said they could possibly add to the phrase, "to the extent that physical impairment or disfigurement do not cause economic damage." **Mr. Hill** said the cleaner way would be to say, "physical impairment or disfigurement," and then track the language in Subsection D that is not subjective and non-monetary.

Motion: **SENATOR HALLIGAN WITHDREW HIS MOTION ON ITEM # 3. HE FURTHER MOVED TO AMEND HB 309 BY A NEW MOTION AT THE END OF PHYSICAL IMPAIRMENT OR DISFIGUREMENT, USING CONSISTENT LANGUAGE THAT IS NOT SUBJECTIVE OR NON-MONETARY.**

Discussion: **Valencia Lane** said the original amendment to take Subsection (iv) out was a good amendment. She thought that Items 1, 2, 3, 5, 7, and 8 were apples and 4 was an orange and did not belong. The intent is that non-economic losses resulting from physical impairment and disfigurement are non-economic losses. But if they define physical impairment itself to be non-economic loss, it would create a great ambiguity. They do not mean to include actual loss of wages. The intent is not to include that in non-economic losses, but by definition they are saying in black and white that physical impairment and disfigurement is a non-economic loss. Period. She did not think it belonged in the definition. The intent is non-economic losses FLOWING from impairment and disfigurement is a non-economic loss. **CHAIRMAN CRIPPEN** asked if they could take it out, but where would it go? It would have to go into economic losses. It had to be one or the other. Or perhaps punitive. **Ms. Lane,** with due respect, disagreed. She said one kind of injury can result in more than one kind of loss. An injury to an arm could result in loss of wages, which is an economic loss. It could result in pain and suffering, which is a non-economic loss. It could result in a spouse having a claim for loss of consortium possibly. The loss would not necessarily have to be categorized as an economic or non-economic or punitive. The bill says: physical impairment is non-economic. Period. **CHAIRMAN CRIPPEN** said they could take it out, but there was no place for it. **Ms. Lane** insisted there was. It could be under physical pain and suffering, emotional distress, inconvenience, loss of society, companionship and consortium, injury to reputation. **Ms. Jamison** said the debate underscored that everyone is confused. She thought the amendment would make it clear that even though it was a mixing of apples and oranges, (and that **Ms. Lane** was the best drafter in the legislature) to use the same language that's not subjective and non-economic. That was if the person loses wages, they would get it. But if they haven't lost wages, and are trying to sue for the physical impairment, it would blow the cap off the cap. The amendment would make the distinction. **Ms. Lane** summarized the amendment: on Page 2, Line 26, after (iv), insert, "subjective, non-monetary loss arising from physical impairment or disfigurement."

Vote: The **MOTION CARRIED UNANIMOUSLY** on an oral vote.

Discussion: **SENATOR GROSFIELD** asked about the physical impairment under Subsection I. He thought the same thing might apply to physical pain. If he could not work only because of pain, doesn't the same issue apply? **Mr. Loendorf** said he was unsure that they needed the other amendment. If they looked at the definition, the lead-in phrase of non-economic loss meant subjective non-monetary loss, including, but not limited to these causes. If the things could also cause an economic loss, they are not included, or not covered.

Motion/Vote: **SENATOR NELSON MOVED THAT HB 309 BE RECOMMENDED BE CONCURRED IN AS AMENDED.** The **MOTION PASSED** on a roll call vote of 7-4. It was determined that **SENATOR BENEDICT** would carry the bill.

EXECUTIVE ACTION ON HB 345 and 256

Discussion: **SENATOR HALLIGAN** explained that these bills were not DUI Task Force bills, but separate bills introduced by legislators with ideas. There were a number of surcharge bills. They melded the bills into one bill. They made one bill a penalty bill. Thus, they had put a defined issue within each bill. **Valencia Lane** explained the amendments. She pointed to hb034502.avl, **(EXHIBIT 7).** She had minor changes. On Item # 7, she asked to strike out Page 2, Line 26, and Page 2, Line 29. On Item # 8, following (1) (c), strike (1) (c), and insert, "must be." Strike, "and," after Insert, then strike, "must be," and insert, "and." She said there were two Senate bills and two House bills. The Senate bills are long gone. What remained in the committee were two bills, HB 256 and HB 345. There were two major conflicts, she said. One of the Senate bills created a felony on fourth offense. The House bill also created a felony for DUI, but on the third offense. The decision to be made was: third or fourth offense felony. The amendments to HB 256 would address that conflict. **(EXHIBIT 8)** One the last page there is a coordination instruction, coordinating with SB 316, which is fourth offense felony. If both bills pass, HB 256 would supersede. The Senate bill fourth offense would die and they would end up with a third offense felony for DUI's. Another conflict was that both House bills contained surcharges for DUI's. The amendments had been drafted for HB 256 and HB 345 because they both contain surcharges. The amendments to HB 256 strip the surcharges out of HB 256 to eliminate that conflict. HB 345 and its surcharges would be left. One of the policy decisions that needed to be made was all the bills talked about DUI's and not *per se* (the refusal to take the test). The amendments would put the *per se* statute into the bills and make it parallel third or fourth offense felonies. **Peter Funk, DUI Task Force Attorney,** commented on HB 256. This would also increase the penalties for first and second offenders, as well as saying third-time offenders are felonies. He said it was a harsher bill than the one passed earlier because it not only had the felony trigger at a lower level, but also increased the

SENATE STANDING COMMITTEE REPORT

March 23, 1995

MR. PRESIDENT:
We, your committee on Judiciary having had under consideration HB 309 (third reading copy -- blue), respectfully report that HB 309 be amended as follows and as so amended be concurred in.

Signed: _____
Senator Bruce Crippen, Chair

That such amendments read:

1. Page 1, line 19.
Following: "malpractice,"
Strike: "the combined awards"
Insert: "an award"

2. Page 1, line 20.
Following: "$250,000"
Strike: ","
Insert: ". All claims for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed $250,000. This limitation applies"

3. Page 1, line 21.
Strike: subsection (i) in its entirety
Renumber: subsequent subsections

4. Page 1, line 23.
Following: ";"
Strike: "and"
Insert: "or"

5. Page 1, line 25.
Following: line 24
Insert: "(b) If a single incident of malpractice injures multiple, unrelated patients, the limitation on awards contained in subsection (1)(a) applies to each patient and all claims deriving from injuries to that patient. "

6. Page 1, line 25.
Strike: "(b) A"
Insert: "(2)(a) For purposes of the limitation on awards contained in subsection (1), a"

7. Page 2, line 2.
Strike: "(c)"
Insert: "(b)"

Amd. Coord. _____ Sen. Benedict
Sec. of Senate Senator Carrying Bill

8. Page 2, line 6.
Strike: "(2)"
Insert: "(3)"
Renumber: subsequent subsections

9. Page 2, line 26.
Following: "(iv)"
Insert: "subjective, nonmonetary loss arising from"

10. Page 2, line 30.
Following: line 29
Insert: "(e) "Patient" means a person who receives services from a health care provider."

11. Page 3, line 2.
Following: "defined in"
Strike: "27-6-103"
Insert: "[section 1]"

-END-

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER 1

MOTION: Halligan amend 30902

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON	/	

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FAILED

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER (2)

MOTION: Crippen Motion - Amend - 303 By 30903

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	/	
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON		/

SEN:1995
wp:rlclvote.man

4 7

FAILED

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER (3)

MOTION: Hallegi - 30902 # 2

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	/	
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON		/

SEN:1995
wp:rlclvote.man

4 7

Failed

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. 309 NUMBER (4)

MOTION: Doherty Amendment 30905 #3

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		✓
LARRY BAER		✓
SUE BARTLETT	✓	
AL BISHOP, VICE CHAIRMAN		✓
STEVE DOHERTY	✓	
SHARON ESTRADA		✓
LORENTS GROSFIELD		✓
MIKE HALLIGAN	✓	
RIC HOLDEN		✓
REINY JABS		✓
LINDA NELSON		✓

SEN:1995
wp:rlclvote.man

3 8

Failed

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER (5)

MOTION: 30905 # 4 (Doherty Amendments)

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER		/
SUE BARTLETT	/	
AL BISHOP, VICE CHAIRMAN		/
STEVE DOHERTY	/	
SHARON ESTRADA		/
LORENTS GROSFIELD		/
MIKE HALLIGAN	/	
RIC HOLDEN		/
REINY JABS		/
LINDA NELSON		/

SEN:1995
wp:rlclvote.man

3 8

Failed

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 3-23-95 BILL NO. HB 309 NUMBER 6

MOTION: Nelson – ~~DPAA~~ BCIAA

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		/
LARRY BAER	/	
SUE BARTLETT		/
AL BISHOP, VICE CHAIRMAN	/	
STEVE DOHERTY		/
SHARON ESTRADA	/	
LORENTS GROSFIELD	/	
MIKE HALLIGAN		/
RIC HOLDEN	/	
REINY JABS	/	
LINDA NELSON	/	

SEN:1995
wp:rlclvote.man

7 4

PASSED

BCIAA

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 3-23-95
BILL NO. HB 309

Amendments to House Bill No. 309
Third Reading Copy (blue)

Requested by Senator Halligan
For the Committee on Judiciary

Prepared by Valencia Lane
March 22, 1995

1. Title, lines 11 through 13.
Following: "CASES;" on line 11
Strike: remainder of line 11 through "MCA;" on line 13

2. Page 1, line 20.
Page 1, line 26 (in 2 places).
Page 1, line 29.
Page 1, line 30 (in 2 places).
Page 2, line 7.
Strike: "$250,000"
Insert: "$500,000"

3. Page 3, line 1 through page 4, line 18.
Strike: sections 2 and 3 in their entirety
Renumber: subsequent sections

4. Page 4, line 20.
Strike: "[Sections 1 and 2] are"
Insert: "[Section 1] is"

5. Page 4, line 22.
Strike: "sections 1 and 2"
Insert: "section 1"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 3-23-95
BILL NO. HB 309

Amendments to House Bill No. 309
Third Reading Copy (blue)

Requested by Senator Crippen
For the Committee on Judiciary

Prepared by Valencia Lane
March 22, 1995

1. Page 1, line 20.
   Page 1, line 26 (in 2 places).
   Page 1, line 29.
   Page 1, line 30 (in 2 places).
   Page 2, line 7.
Strike: "$250,000"
Insert: "$600,000"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 3-23-95
BILL NO. HB309

Amendments to House Bill No. 309
Third Reading Copy (blue)

Requested by Senator Doherty
For the Committee on Judiciary

Prepared by Valencia Lane
March 22, 1995

1. Page 1, line 20.
   Page 1, line 26 (in 2 places).
   Page 1, line 29.
   Page 1, line 30 (in 2 places).
Strike: "$250,000"
Insert: "$1 million"

2. Page 2, line 7.
Strike: subsection (3) in its entirety
Renumber: subsequent subsection

3. Page 2, line 21.
Following: "DEATH."
Insert: "Malpractice claim does not mean a claim based on a grossly negligent act or omission by a health care provider in the rendering of professional services."

4. Page 3, lines 19 and 20.
Following: "bond." on line 19
Strike: remainder of line 19 through "discharged." on line 20

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 3-23-95
BILL NO. HB 309

Amendments to House Bill No. 309
Third Reading Copy (blue)

Requested by Senator Grosfield
For the Committee on Judiciary

Prepared by Valencia Lane
March 22, 1995

1. Page 1, line 19.
Following: "malpractice,"
Strike: "the combined awards"
Insert: "an award"

2. Page 1, line 20.
Following: "$250,000"
Strike: ","
Insert: ". All claims deriving from injuries to a patient are subject to an award not to exceed $250,000. This limitation applies"

3. Page 1, line 21.
Strike: subsection (i) in its entirety
Renumber: subsequent subsections

4. Page 1, line 23.
Following: ";"
Strike: "and"
Insert: "or"

5. Page 1, line 25.
Following: line 24
Insert: "(b) If a single incident of malpractice injures multiple, unrelated patients, the limitation on awards contained in subsection (1)(a) applies to each patient and all claims deriving from injuries to that patient. "

6. Page 1, line 25.
Strike: "(b) A"
Insert: "(2)(a) For purposes of the limitation on awards contained in subsection (1), a"

7. Page 2, line 2.
Strike: "(c)"
Insert: "(b)"

8. Page 2, line 6.
Strike: "(2)"
Insert: "(3)"
Renumber: subsequent subsections

9. Page 2, line 30.
Following: line 29
Insert: "(e) "Patient" means a person who receives services from a health care provider."

10. Page 3, line 2.
Following: "defined in"
Strike: "27-6-103"
Insert: "[section 1]"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 3-23-95
BILL NO. HB 309

HOUSE BILL NO. 309

INTRODUCED BY GRIMES, BENEDICT, BARNETT, BAER, ORR, HEAVY RUNNER, MILLS, MILLER, ANDERSON, COLE, CURTISS, EMERSON, DENNY, HARGROVE, MOLNAR, WELLS, SOFT, HERTEL, ROSE, TASH, BOHLINGER, MCGEE, SPRAGUE, HIBBARD, MOHL, MASOLO, ESTRADA, HAYNE, JABS, PECK, BROWN, GROSFIELD, OHS, CLARK, SIMPKINS, JACOBSON, DEVLIN, HARP, JERGESON, JENKINS, ZOOK, REHBEIN, TOEWS, SWYSGOOD, KITZENBERG, STOVALL, KNOX, FOSTER, HARDING, L. NELSON, BURNETT, SCHWINDEN, AKLESTAD, HOLDEN, S. SMITH

BY REQUEST OF THE GOVERNOR'S OFFICE

A BILL FOR AN ACT ENTITLED: "AN ACT RELATING TO MEDICAL MALPRACTICE CLAIMS AND RECOVERIES; LIMITING NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES; REVISING THE LAW RELATING TO PERIODIC PAYMENT OF FUTURE DAMAGES IN MEDICAL MALPRACTICE CASES; AMENDING SECTION 25-9-403, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Medical malpractice noneconomic damages limitation.** (1) (a) In a malpractice claim or claims against one or more health care providers based on a single incident of malpractice, ~~the combined awards~~ an award for past and future damages for noneconomic loss may not exceed $250,000 ~~whether:~~

~~(i) for one or more claimants in the same proceeding or separate proceedings;~~

(ii) based on the same act or a series of acts that allegedly caused the injury, injuries, death, or deaths on which the action or actions are based; ~~and~~ or

(iii) the act or series of acts were by one or more health care providers.

~~(b)~~ (b) If a single incident of malpractice injures multiple, unrelated patients, a claimant has the burden of proving separate injuries, each arising from a different act or series of acts. An award or combination of awards in excess of $250,000 must be reduced to $250,000, after which the court shall make other reductions that are required by law. If a combination of awards for past and future noneconomic loss is reduced in the same action, future noneconomic loss must be reduced first and, if necessary to reach the $250,000 limit, past noneconomic loss must then be reduced. If a combination of awards is reduced to $250,000, a claimant's share of the $250,000 must be the same

for noneconomic loss

• All claims deriving from injuries to a patient are subject to an award not to exceed $250,000. This limitation applies whether:

"(2)(a) For purposes of the limitation on awards contained in subsection (1), a" the limitation on awards contained in subsection (1)(a) applies to each patient and all claims deriving from injuries to that patient."

percentage as the claimant's share of the combined awards before reduction.

"(b) ~~(c)~~ For each claimant, further reductions must be made in the following order:

(i) first, reductions under 27-1-702;

(ii) second, reductions under 27-1-703; and

(iii) third, setoffs and credits to which a defendant is entitled.

"(3) ~~(2)~~ An award of future damages for noneconomic loss may not be discounted to present value.

"(4) ~~(3)~~ The $250,000 limit provided for in subsection (1) may not be disclosed to a jury.

"(5) ~~(4)~~ As used in this section, the following definitions apply:

(a) "Claimant" includes but is not limited to:

(i) a person suffering bodily injury;

(ii) a person making a claim as a result of bodily injury to or the death of another;

(iii) a person making a claim on behalf of someone who suffered bodily injury or death;

(iv) the representative of the estate of a person who suffered bodily injury or death; or

(v) a person bringing a wrongful death action.

(b) "Health care provider" means a physician, dentist, ~~or health care facility, as defined in 27-6-103, or a nurse licensed under Title 37, chapter 8~~ PODIATRIST, OPTOMETRIST, CHIROPRACTOR, PHYSICAL THERAPIST, OR NURSE LICENSED UNDER TITLE 37 OR A HEALTH CARE FACILITY LICENSED UNDER TITLE 50, CHAPTER 5.

(c) "Malpractice claim" ~~has the meaning as defined in 27-6-103~~ MEANS A CLAIM BASED ON A NEGLIGENT ACT OR OMISSION BY A HEALTH CARE PROVIDER IN THE RENDERING OF PROFESSIONAL SERVICES THAT IS THE PROXIMATE CAUSE OF A PERSONAL INJURY OR WRONGFUL DEATH.

(d) "Noneconomic loss" means subjective, nonmonetary loss, including but not limited to:

(i) physical and mental pain or suffering;

(ii) emotional distress;

(iii) inconvenience;

(iv) physical impairment or disfigurement;

(v) loss of society, companionship, and consortium, other than household services;

(vi) injury to reputation; and

(vii) humiliation.

"(e) "Patient" means a person who receives services from a health care provider."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 3-23-95
BILL NO. HB 309

Amendments to House Bill No. 309
Third Reading Copy (blue)

Requested by Senator Halligan
For the Committee on Judiciary

Prepared by Valencia Lane
March 22, 1995

1. Page 1, line 18.
Following: "single"
Strike: "incident of"
Insert: "injury or death caused by"

2. Page 1, lines 22 and 23.
Following: "injury" on line 22
Strike: remainder of line 22 through "deaths" on line 23
Insert: "or death"

3. Page 2, line 26.
Strike: subsection (iv) in its entirety
Renumber: subsequent subsections

Total 0

Absent or not voting: None.

Total 0

HB 308 (Senate - Second Reading - Eighty-Third Legislative Day) Free Conference Committee - Senator Beck moved the Free Conference Committee report to HB 308 be adopted. Motion carried unanimously.

HB 308 (Senate - Second Reading - Seventy-Second Legislative Day)- Senator Gage moved HB 308 be concurred in. Motion carried unanimously.

HB 309 (House - Second Reading - Thirty-Ninth Legislative Day) - Representative Grimes moved HB 309 do pass.

Representative Wyatt moved consideration of HB 309 be placed below HB 315 on the second reading board. Motion carried.

HB 309 (House - Second Reading - Thirty-Ninth Legislative Day) - Representative Wyatt moved HB 309, second reading copy, be amended (amendment #1). Amendment #1 failed as follows:

Ayes: Barnhart, Carey, Cobb, Cocchiarella, Ellingson, Elliott, Ewer, Feland, Galvin, Hagener, Harper, Harrington, Hurdle, J. Johnson, Kadas, Kottel, Larson, McCann, McCulloch, Menahan, Pavlovich, Peck, Quilici, Raney, Ream, Ryan, Shea, Squires, Swanson, Tropila, Tuss, Wennemar, Wyatt.

Total 33

Noes: Anderson, Arnott, Barnett, Bergman, Bergsagel, Boharski, Bohlinger, Brainard, Clark, Curtiss, DeBruycker, Denny, Devaney, Ellis, Fisher, Forbes, Fuchs, Grady, Green, Grimes, Grinde, H.S. Hanson, M. Hanson, Hayne, Heavy Runner, Herron, Hibbard, Holland, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Knox, Marshall, Martinez, Masolo, McGee, McKee, Mills, Molnar, Murdock, Nelson, Ohs, Orr, Rehbein, Rose, Simon, Simpkins, Sliter, L. Smith, S. Smith, Soft, Somerville, Story, Stovall, Tash, Taylor, Trexler, Vick, Wagner, Wells, Wiseman, Zook, Mr. Speaker.

Total 65

Voted Absentee: Galvin, Tropila, Ayes.

Excused: Ahner, Schwinden.

Total 2

Absent or not voting: None.

Total 0

Representatives Galvin and Tropila present at this time.

Representative Grimes moved HB 309 do pass. Motion carried as follows:

Ayes: Ahner, Anderson, Arnott, Barnett, Bergman, Bergsagel, Boharski, Bohlinger, Brainard, Clark, Curtiss, DeBruycker, Denny, Devaney, Ellis, Fisher, Forbes, Fuchs, Grady, Green, Grimes, Grinde, H.S. Hanson, M. Hanson, Hayne, Heavy Runner, Herron, Hibbard, Holland, J. Johnson, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Knox, Marshall, Martinez, Masolo, McCann, McGee, McKee, Mills, Molnar, Murdock, Nelson, Ohs, Orr, Rehbein, Rose, Schwinden, Simon, Simpkins, Sliter, L. Smith, S. Smith, Soft, Somerville, Story, Stovall, Tash, Taylor, Trexler, Vick, Wagner, Wells, Wiseman, Zook, Mr. Speaker.

Total 69

Noes: Barnhart, Carey, Cobb, Cocchiarella, Ellingson, Elliott, Ewer, Feland, Galvin, Hagener, Harper, Harrington, Hurdle, Kadas, Kottel, Larson, McCulloch, Menahan, Pavlovich, Peck, Quilici, Raney, Ream, Ryan, Shea, Squires, Swanson, Tropila, Tuss, Wennemar, Wyatt.

Total 31

Voted Absentee: Ahner, Schwinden, Ayes.

Excused: None.

Total 0

Absent or not voting: None.

Total 0

HB 309 (House - Second Reading - Seventy-Seventh Legislative Day)- Representative Grimes moved Senate amendments to HB 309 be concurred in. Motion carried as follows:

Ayes: Ahner, Anderson, Arnott, Barnett, Bergman, Bergsagel, Boharski, Bohlinger, Brainard, Carey, Clark, Curtiss, DeBruycker, Denny, Devaney, Elliott, Ellis, Feland, Fisher, Forbes, Fuchs, Galvin, Grady, Green, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Harper, Harrington, Hayne, Heavy Runner, Herron, Hibbard, Holland, J. Johnson, R. Johnson, Jore, Kadas, Kasten, Keenan, Kitzenberg, Knox, Kottel, Larson, Marshall, Martinez, Masolo, McCann, McCulloch, McGee, McKee, Menahan, Mills, Molnar, Murdock, Nelson, Ohs, Orr, Pavlovich, Peck, Quilici, Raney, Ream, Rehbein, Rose, Ryan, Schwinden, Simon, Simpkins, Sliter, L. Smith, S. Smith, Soft, Somerville, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Vick, Wagner, Wells, Wiseman, Zook, Mr. Speaker.

Total 89

Noes: Barnhart, Cobb, Cocchiarella, Ellingson, Ewer, Hurdle, Shea, Squires, Tuss, Wennemar, Wyatt.

Total 11

Voted Absentee: Pavlovich, Soft, Ayes.

Excused: None.

Total 0

Absent or not voting: None.

Total 0

HB 309 (Senate - Third Reading - Seventy-Third Legislative Day) , as amended, concurred in as follows:

Yeas: Aklestad, Baer, Beck, Benedict, Bishop, Burnett, Cole, Crismore, Devlin, Emerson, Estrada, Forrester, Foster, Gage, Grosfield, Harding, Hargrove, Harp, Hertel, Holden, Jabs, Jacobson, Jenkins, Jergeson, Keating, Mesaros, Miller, Mohl, Nelson, Sprague, Swysgood, Toews, Tveit, Mr. President.

Total 34

Nays: Bartlett, Brooke, Christiaens, Crippen, Doherty, Eck, Franklin, Halligan, Klampe, Lynch, Pipinich, Stang, Van Valkenburg, Waterman, Weldon, Wilson.

Total 16

Absent or not voting: None.

Total 0

Excused: None.

Total 0

HB 309 (House - Third Reading - Fortieth Legislative Day) passed as follows:

Ayes: Ahner, Anderson, Arnott, Barnett, Bergman, Bergsagel, Boharski, Bohlinger, Brainard, Clark, Curtiss, DeBruycker, Denny, Devaney, Ellis, Fisher, Forbes, Fuchs, Grady, Green, Grimes, Grinde, H.S. Hanson, M. Hanson, Hayne, Heavy Runner, Herron, Hibbard, Holland, J. Johnson, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Knox, Larson, Marshall, Martinez, Masolo, McGee, McKee, Mills, Molnar, Murdock, Nelson, Ohs, Orr, Pavlovich, Quilici, Raney, Rehbein, Rose, Schwinden, Shea, Simpkins, Sliter, L. Smith, S. Smith, Soft, Somerville, Story, Stovall, Tash, Taylor, Trexler, Vick, Wagner, Wells, Wiseman, Zook, Mr. Speaker.

Total 72

Noes: Carey, Cobb, Cocchiarella, Ellingson, Elliott, Ewer, Feland, Galvin, Harper, Harrington, Hurdle, Kadas, Kottel, McCann, McCulloch, Menahan, Peck, Ream, Ryan, Simon, Swanson, Tropila, Tuss, Wennemar, Wyatt.

Total 25

Excused: None.

Total 0

Absent or not voting: Barnhart, Hagener, Squires.

Total 3

HB 309 (House - Third Reading - Seventy-Eighth Legislative Day) - as amended by the Senate concurred in as follows:

Ayes: Ahner, Anderson, Arnott, Barnett, Barnhart, Bergman, Bergsagel, Boharski, Bohlinger, Brainard, Clark, Curtiss, DeBruycker, Denny, Devaney, Elliott, Ellis, Feland, Fisher, Forbes, Fuchs, Galvin, Grady, Green, Grimes, Grinde, Hagener, H.S. Hanson, M. Hanson, Hayne, Heavy Runner, Herron, Hibbard, Holland, J. Johnson, R. Johnson, Jore, Kasten, Keenan, Kitzenberg, Knox, Larson, Marshall, Martinez, Masolo, McCann, McGee, McKee, Menahan, Mills, Molnar, Murdock, Nelson, Ohs, Orr, Pavlovich, Quilici, Rehbein, Rose, Ryan, Schwinden, Simon, Simpkins, Sliter, L. Smith, S. Smith, Soft, Somerville, Story, Stovall, Swanson, Tash, Taylor, Trexler, Tropila, Tuss, Vick, Wagner, Wells, Wiseman, Zook, Mr. Speaker.

Total 82

Noes: Carey, Cobb, Cocchiarella, Ellingson, Ewer, Harper, Harrington, Hurdle, Kadas, Kottel, McCulloch, Raney, Ream, Shea, Squires, Wennemar, Wyatt.

Total 17

Voted Absentee: Pavlovich, Aye.

Excused: Peck.

Total 1

Absent or not voting: None.

Total 0